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No. 00-000

IN THE

# Supreme Court of the United States

CHUBB & SON, INC., As subrogee of Samsung Semiconductor,

*Petitioner,*

—v.—

ASIANA AIRLINES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether The Court of Appeals For The Second Circuit Erred in Finding That The Republic of Korea Did Not Become a Party to The Convention For The Unification of Certain Rules Relating to International Transportation by Air ("The Warsaw Convention") by Signing The Protocol to Amend The Convention For The Unification of Certain Rules Relating to International Carriage by Air ("The Hague Protocol"), Given That South Korea Has Adopted The Vienna Convention on The Law of Treaties ("The Vienna Convention"), That U.S. Courts Recognize The Vienna Convention as Codifying Existing Customary International Law, And The Vienna Convention Provides That Any State That Becomes a Party to a Multilateral Treaty Is Considered a Party to The Unamended Treaty in Relation to Any Party to The Treaty Not Bound by The Amendments.

II Whether The Court of Appeals For The Second Circuit Erred in Finding That by Adhering to The Hague Protocol, South Korea Expressed an Intention Not to Be Bound to The Original Warsaw Convention Vis-a-vis a Nation Which Is Party Only to The Original Warsaw Convention.

II Even If South Korea Is Found Not to Be Bound by The Warsaw Convention in Its Entirety Vis-a-vis a Nation

Which Is Party Only to The Original Warsaw Convention, Did The Court of Appeals For The Second Circuit Err in Finding That The United States And South Korea Are Not in Treaty Relations at All in Respect to The Warsaw Convention System Such That Subject Matter Jurisdiction Based Upon Treaty Jurisdiction Under 28 U.S.C. § 1331 Would Exist?

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301 (2d Cir. 2000), is set forth in the Appendix hereto.

The Memorandum and Order of the District Court for the Southern District of New York in *Chubb & Son, Inc. V. Asiana Airlines*, 1998 WL 647185 (S.D.N.Y. Sept. 22, 1998), is set forth in the Appendix hereto.

The Report and Recommendation of Magistrate Judge Andrew J. Peck in *Chubb & Son, Inc. v. Asiana Airlines*, 1997 WL 1040543 (S.D.N.Y. June 17, 1997), is set forth in the Appendix hereto.

## BASIS FOR JURISDICTION

The United States Court of Appeals for the Second Circuit granted Chubb & Son, Inc.'s petition for leave to appeal pursuant to 28 U.S.C. § 1292(b) on May 25, 1999.

The judgment of the United States Court of Appeals for the Second Circuit reversing the decision of the District Court of the Southern District of New York was entered on June 8, 2000.

On June 26, 2000 the Second Circuit Court of Appeals entered an Order extending the time to file a petition for rehearing until July 7, 2000.

On July 7, 2000 Chubb & Son, Inc. filed a Petition for Rehearing with a Suggestion for Rehearing En Banc in the United States Court of Appeals for the Second Circuit. The petition for rehearing was denied on August 4, 2000. This petition for writ of certiorari is filed within ninety (90) days from the date of the denial of the petition for rehearing. 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.4.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS INVOLVED.

**Federal Question Jurisdiction–28 U.S.C. Section 1331:**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

**Diversity Jurisdiction–28 U.S.C. §1332:**

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-

(2) citizens of a State and citizens or subjects of a foreign state;

**Vienna Convention on the Law of Treaties, Article 40:**

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting states, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every state entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any state already a party to the treaty which does not become a party to the amending agreement; Article 30, paragraph 4(b), applies in relation to such state.

5. Any state which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that state:

(a) be considered as a party to the treaty as amended, and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), Reprinted in 49 U.S.C. § 40105

Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on October 12, 1929, As Amended by the Protocol Done a the Hague on September 8, 1955, Reprinted in 5 Exec. Rep. No. 105-20, pp. 21-32 (1998)

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, September 28, 1955 ("Hague Protocol"), 478 U.N.T.S. 371 (1955)

## STATEMENT OF THE CASE.

In 1995, Asiana Airlines ("Asiana"), a South Korean corporation, agreed to transport seventeen parcels of computer chips from Seoul, South Korea to San Francisco, California pursuant to Asiana air waybill No. 988-0497-2951 (the "Waybill"), naming Samsung Electronics Co., Ltd., also a South Korean corporation, as the shipper and Samsung Semiconductor, a U.S. Corporation, as the consignee. The Waybill provided that the shipment would be made on Asiana Flight 214 from Seoul to San Francisco on August 10, 1995. The Waybill did not refer to any other stops en route and Flight 214 had no other scheduled stops.

The seventeen parcels were delivered to Asiana. However, Asiana transported the parcels on Asiana Flight 202 from Seoul to Los Angeles, California, and thereafter trucked the parcels to San Francisco. Asiana did not inform Samsung Electronics Co., Ltd. or Samsung Semiconductor in writing of this change, nor did it conform the Waybill to the change. Upon delivery in San Francisco, two of the seventeen parcels were missing. The two missing parcels had a combined weight of 35.3 kilograms and contained $583,000.00.

Samsung Semiconductor filed a claim of loss with its cargo insurance underwriter, Chubb & Son, Inc. ("Chubb"). Chubb paid Samsung Semiconductor $583,000.00 plus an additional amount based upon the terms of the cargo insurance policy.

Chubb instituted an action against Asiana as the subrogated underwriter of Samsung Semiconductor in the District Court for the Southern District of New York on July 3,

1996, seeking to recover the total amount paid by Chubb of $641,300.00. Cross motions for partial summary judgment were filed on the issue of whether Asiana could avail itself of the limitation on liability found in Article 22(2) of the Warsaw Convention. Both motions addressed the issue of whether the Warsaw Convention's Article 8(c) requirement that a carrier's air waybill contain the "agreed stopping places" had been breached by Asiana, precluding it from enjoying the limitation otherwise afforded by Article 22(2). If the limitation were found to apply, it would limit Asiana's liability to $20.00 per kilogram of cargo lost, which in this case would be $706.00.

On June 17, 1997, Magistrate Judge Andrew J. Peck issued a Report and Recommendation finding that Asiana had violated the "agreed stopping places" requirement of the Warsaw Convention and recommending that Chubb's motion be granted and Asiana's motion be denied. While the parties' objections to the Report and Recommendation were pending before the District Court, Asiana sought leave to file a supplemental motion for summary judgment, urging that the agreed stopping places requirement did not apply to the carriage at issue because South Korea was party only to the Warsaw Convention as amended by the Hague Protocol, and not the Original Warsaw. The Hague Protocol amended the Warsaw Convention, *inter alia*, by eliminating the "agreed stopping places" requirement.

On September 18, 1998, the District Court granted Asiana's supplemental motion, finding that Asiana's maximum liability was $706.00. The District Court found that the United States and South Korea were in treaty relations only with respect to the provisions of the Warsaw Convention that were

not altered by the Hague Protocol amendments. Article 18 of the Warsaw Convention, which provides that the carrier shall be liable for damages sustained in the event of loss of goods, was not amended by the Hague Protocol. Article 22 was amended by the Hague Protocol in form, but the amendments did not alter the liability limitation. Thus, the District Court enforced those provisions. As respects the Article 8(c) "agreed stopping places" requirement, the District Court held that it was not part of the truncated treaty agreement between the United States and South Korea since it had been deleted by the Hague Protocol amendments. Thus, the District Court found that Asiana could limit its liability under Article 22(2), but was not obligated to incorporate the "agreed stopping places" in order to enjoy that limitation.

Chubb moved in the District Court to certify for appeal the questions decided in the September 18, 1998 Memorandum and Order, and on December 14, 1998, the District Court certified the questions. By Mandate issued May 28, 1999, the Court of Appeals for the Second Circuit granted Chubb's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

On June 8, 2000, the Court of Appeals issued its decision, reversing the decision of the District Court. The Court of Appeals found that the Warsaw Convention and the Hague Protocol are two separate and distinct treaties and, applying customary international law, determined that the United States and South Korea are not in treaty relations with respect to the Warsaw Convention System. Accordingly, the Court of Appeals found treaty jurisdiction under 28 U.S.C. §1331 lacking and remanded the case to the District Court to

determine whether some other basis for subject matter jurisdiction exists.

On June 26, 2000, the Court of Appeals extended the time to file a petition for rehearing until July 7, 2000. On July 7, 2000, Chubb filed a petition for rehearing. The Court of Appeals denied Chubb's petition by order entered on August 4, 2000.

With respect to subject matter jurisdiction in the District Court, one of the issues sought to be appealed is whether federal question jurisdiction based upon treaty jurisdiction under 28 U.S.C. § 1331 exists. However, Chubb maintains that regardless of how that question is answered, subject matter jurisdiction exists under 28 U.S.C. § 1331 because international air transportation, even if not governed by the Warsaw Convention, is governed by federal common law, and thus involves a federal question. Finally, there is diversity jurisdiction pursuant to 28 U.S.C. §1332(a)(2), because Chubb is a domestic corporation incorporated in the State of New York with an office and principal place of business in New York, Asiana is a foreign corporation with its principal place of business in South Korea, and the amount in controversy exceeds the $75,000.00 jurisdictional threshold.

## REASONS FOR GRANTING THE WRIT.

### I. The Court of Appeals Decision Is Contrary to The Stated Goal of The Warsaw Convention System–the Establishment of Uniform Rules-and to Precedence Set by This Court.

The district court in *In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C.Cir. 1987) *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed.2d 113 (1989), was effectively overruled by the Court of Appeals' decision, at least with regard to the discussion of subject matter jurisdiction contained in that opinion. In its opinion, the *Korean Air Lines Disaster* district court noted that a finding that the United States and South Korea are not in treaty relations with respect to the Warsaw Convention System would be contrary to the goal of the Convention to establish "uniform rules, law and procedure for claims arising out of international aviation." *In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. at 1469. That district court went on to note that "[t]he delegates to the Hague Conference were well aware of this and deliberately adopted the negotiated amendments merely as a Protocol to Amend Warsaw rather than as an entirely new convention specifically to retain uniformity." *Id.* (citing S. Speiser & C. Krause, 1 Aviation Tort Law, § 11:18 at 672).

The decision of the Court of Appeals contravenes the intention of the Warsaw Convention System and of the Hague Convention participants by finding that the Hague Protocol is

a separate treaty wholly distinct from the Warsaw Convention, rather than a series of amendments to the Warsaw Convention, despite the fact that the Hague Protocol consists of nothing more than amendments to the Warsaw Convention. If the parties to the Hague Protocol had wanted to create an international treaty wholly separate from the Warsaw Convention, they could have created the "Hague Convention Relating to International Carriage By Air." However, they did not. Rather, they amended the Warsaw Convention. This distinction is not merely academic. It shows the intent of the Hague Protocol signatories to become part of the Warsaw Convention "system".

This Court has observed that the "cardinal purpose" of the Warsaw Convention is to "achiev[e] uniformity of rules governing claims arising from international air transportation." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 169, 119 S. Ct. 662, 671-72, 142 L. Ed.2d 576 (1999) (quoting *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552, 111 S. Ct. 1489, 113 L. Ed.2d 569). By finding the United States and South Korea are not in treaty relations, the Court of Appeals decision contravenes the cardinal purpose of the Warsaw Convention and contradicts the above precedence of this Court. This Court has in the past rejected treaty interpretations that clearly unduly restrict rights a treaty is adopted to protect and otherwise contradict the stated purpose of the treaty. *Kolovrat v. Oregon*, 366 U.S. 187, 193, 81 S. Ct. 922, 925, 6 L. Ed.2d 218 (1961); *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163, 61 S. Ct. 219, 225, 85 L. Ed. 98; *Jordan v. Tashiro*, 278 U.S. 123, 128-129, 49 S. Ct. 47, 48-49, 73 L. Ed. 214).

This Court went on to state in *Tseng* that "[g]iven the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. at 169, 119 S. Ct. 662). Given that the Hague Protocol amendments do not disturb the emphasis on uniformity nor the comprehensiveness of the liability scheme, by the same token, it is unlikely that the delegates at The Hague meant to subject air carriers to the distinct, nonuniform liability rules of the individual nations where one was party only to the Hague Protocol amendments and the other party only to the unamended Convention.

## II. This Case Concerns Issues of Treaty Interpretation That Impact Far Beyond the Specific Circumstances of the Case and the Provisions of the Specific Treaty Involved.

At its most basic level, this case involves the interpretation of treaty provisions and of the existence or non-existence of treaty relations between the United States and the Republic of Korea with respect to international air transportation. However, the true import of the issues involved and the broader impact of the decision of the Court of Appeals for the Second Circuit extend well beyond the private parties concerned and the treaty at issue.

The Court of Appeals' decision impacts the manner in which all multilateral international agreements will be

interpreted, particularly where subsequent amendments alter portions of the those agreements. This is particularly important in an era of increasing globalization, where multilateral international agreements will take on a central role in governing the rights and duties among various nations. As such, it is essential for the Supreme Court to provide guidance to lower courts with regard to how to interpret multilateral agreements, especially where the issue concerned is whether the United States is in treaty relations with another nation.

## III. If the Court of Appeals' Decision Stands, There Are No Warsaw Convention System Treaty Relations Between the United States and Many Nations Which Have Adopted Only the Hague Protocol.

The Hague Protocol Amendments were themselves amended by the Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating To International Carriage by Air, Signed at Warsaw on October 12, 1929, As Amended by the Protocol Done a the Hague on September 8, 1955, Reprinted in 5 Exec. Rep. No. 105-20, pp. 21-32 (1998) (hereinafter "MP4"). Thus, if the logic of the Court of Appeals decision is allowed to stand, there are now three separate and distinct multilateral treaties governing international air carriage among nations–the Unamended Warsaw Convention; the Hague Protocol amendments to the Warsaw Convention; and the MP4 amendments to the Hague Protocol amendments to the Warsaw Convention.

Subsequent to the date of the incident underlying this case, the United States adopted the MP4 amendments. Thus, the United States is a party to the Unamended Warsaw Convention and the MP4 amendments. The United States still has not adopted the Hague Protocol amendments (at least if the logic of the Court of Appeals is extended). Thus, despite the adoption of the MP4 amendments, under the Court of Appeals' decision, The United States is still not in treaty relations with South Korea with respect to international transportation by air.

Other countries, like South Korea, who have signed only the Hague Protocol amendments include: India, Malaysia, Nigeria, Pakistan, Kenya, Sri Lanka, Benin, El Salvador, Grenada, Jordan, Lao People's Democratic Republic, Lebanon, Lewotho, Lithuania, Monaco, Rwanda, Samoa, Swaziland, Tonga, and Zambia. Thus, if the Court of Appeals' decision stands, there are no treaty relations with respect to international air carriage between the United States and any of these nations, despite each nation's presumed adherence to the Warsaw System.

## CONCLUSION.

It is respectfully requested that the Petition for a Writ of Certiorari be granted.

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WILLIAM E. ECENBARGER, JR. on the brief

# APPENDIX 1

## Second Circuit Court Opinion

Docket No. 99-7617

United States Court of Appeals,
Second Circuit.

CHUBB & SON, INC., As subrogee of Samsung Semiconductor, Plaintiff-Appellant,

v.

ASIANA AIRLINES, Defendant-Appellee.

Argued Nov. 19, 1999
Decided June 8, 2000

**COUNSEL:**

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**JUDGES:**
Before: KEARSE, PARKER, POOLER, Circuit Judges.

PARKER, Circuit Judge:

Chubb & Son, Inc. ("Chubb"), as subrogee of Samsung Semiconductor, Inc. ("Samsung Semiconductor"), appeals from the judgment of the United States District Court for the Southern District of New York (Lorretta A. Preska, Judge ) entered September 23, 1998, granting partial summary judgement to Asiana Airlines ("Asiana") and thereby limiting its liability to $706.00.

On this appeal we must determine under customary international law whether this dispute is governed by a treaty of the United States. Initially operating under the assumption that the dispute was governed by the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000 (1934), 137 L.N.T.S. 11, reprinted in note following 49 U.S.C. § 40105 (the "Original Warsaw Convention"), the parties cross-moved for partial summary judgment as to whether Asiana could invoke Article 22(2) of the Original Warsaw Convention to limit its liability to $20.00 per kilogram of cargo lost, or $706.00. Sometime thereafter, Asiana sought leave to file a supplemental motion for summary judgment, asserting that the United States and South Korea [FN1] were not in treaty relations with regard to the Original Warsaw Convention because South Korea did not adhere to the Original Warsaw Convention, but adhered only to the amending agreement, known as the "Hague Protocol" and

officially entitled "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929." Adhering to the Hague Protocol had the effect of adherence to the Convention as amended by the Protocol (the "Amended Warsaw Convention"). See Hague Protocol, Sept. 28, 1955, 478 U.N.T.S. 371, 387, art. XXIII(2). The court below concluded that the United States and South Korea were parties to a treaty consisting of the articles common to the Original Warsaw Convention and the Amended Warsaw Convention, and applied that treaty to limit Asiana's liability to $706.00. For the reasons that follow, we reverse the order of the district court and remand for further proceedings.

FN1. On August 15, 1945, Korea was liberated from Japan, and on August 15, 1948, the Republic of Korea was established in the southern portion of Korea. See U.S. Department of State, Bureau of East Asian and Pacific Affairs, Background Notes: South Korea, October 1998 <http://www.state.gov/www/background notes/south korea 1098 bgn.html.> The Republic of Korea is commonly referred to as South Korea. Id.

## I. BACKGROUND

### A. The Undisputed Facts of the Underlying Dispute

The facts relevant to the determination of this appeal are undisputed. In 1995, Asiana, a South Korean corporation, agreed with Samsung Electronics Co., Ltd. ("Samsung"), another South Korean corporation, that Asiana would ship

seventeen parcels of computer chips from Seoul, South Korea, to San Francisco, California pursuant to Asiana air waybill No. 988-0497-2951 (the "Waybill"), with Samsung Semiconductor as the intended recipient. The Waybill provided that shipment of the seventeen parcels would be made on Asiana Flight 214 from Seoul, South Korea to San Francisco, California on August 10, 1995. The Waybill did not refer to any other stops en route and Flight 214 had no other scheduled stops.

The seventeen parcels were delivered to Asiana for shipment. Due to an excess of goods to be shipped, however, Asiana transported the parcels on Asiana Flight 202 from Seoul, South Korea to Los Angeles, California, and thereafter trucked the parcels to San Francisco. Asiana did not inform Samsung or Samsung Semiconductor in writing of this change, nor did it conform the Waybill to this change. Upon delivery in San Francisco, two of the seventeen parcels were missing. Neither party has been able to locate the parcels. The two missing parcels weighed a combined 35.3 kilograms and contained $583,000 worth of computer chips.

The owner and intended recipient of the computer chips, Samsung Semiconductor (a subsidiary of Samsung), had insured the chips against loss or damage through a cargo insurance policy issued by Chubb. Upon Samsung Semiconductor's claim of loss, Chubb paid Samsung Semiconductor $583,000 plus an additional amount based on the terms of the cargo insurance policy.

B. The Proceedings Below

On July 3, 1996, Chubb, as subrogee of Samsung Semiconductor, commenced this action against Asiana in the District Court for the Southern District of New York, seeking to recover the value of the lost computer chips, plus the remaining amount paid by it under the terms of the cargo insurance policy. The parties cross-moved for partial summary judgement on the issue of whether Asiana could invoke Article 22(2) of the Original Warsaw Convention to limit its liability. Judge Preska referred the motion to Magistrate Judge Peck for a report and recommendation.

Asiana argued that it could invoke Article 22(2), which limits an air carrier's liability to $20.00 per kilogram of cargo lost, here $706.00, and offered $800.00 to settle the case. Chubb argued that Asiana could not avail itself of the liability limitation in Article 22(2) because it failed to comply with Article 8(c) of the Original Warsaw Convention. Article 9 of the Original Warsaw Convention precludes an air carrier from availing itself of the liability limitation in Article 22(2) if "the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q)." Original Warsaw Convention, supra, art. 9, 49 Stat. at 3017. Article 8(c) requires that the air waybill contain "[t]he agreed stopping places" for the shipment. Original Warsaw Convention, supra, art. 8(c), 49 Stat. at 3016. In this case, the Waybill did not contain any stopping places, but Asiana nonetheless stopped in Los Angeles. Magistrate Judge Peck issued a well-reasoned and well- supported Report and Recommendation, recommending that Chubb's motion be

granted and Asiana's motion be denied because, having failed to comply with Article 8(c), Asiana could not limit its liability under Article 22(2).

While the parties' objections to the Report and Recommendation were pending before the district court, Asiana sought leave to file a supplemental motion for summary judgment, questioning the court's subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Up until this point, the parties and the court had assumed subject matter jurisdiction based on their belief that the dispute arose under a treaty of the United States, i.e., the Original Warsaw Convention. Because this issue potentially affected subject matter jurisdiction, the district court granted leave.

Asiana argued that the United States and South Korea were not in treaty relations with regard to the Original Warsaw Convention because the United States adhered only to the Original Warsaw Convention and South Korea adhered only to the Hague Protocol, which had the effect of adhering to the Amended Warsaw Convention. Asiana argued that the district court nevertheless had jurisdiction under a treaty consisting of all of the articles common to the Original Warsaw Convention and the Amended Warsaw Convention (hereinafter referred to as the "Truncated Warsaw Convention"). Chubb agreed that the district court had jurisdiction, but contended that the Original Warsaw Convention applied. On September 18, 1998, the district court granted Asiana's supplemental motion for partial summary judgment, agreeing with Asiana that the United States and South Korea were parties to this Truncated

Warsaw Convention, and finding that Asiana's liability under this "treaty" was limited to $706.00. As a result, the district court denied the prior-cross motions as moot.

The district court discussed the interplay between the Original Warsaw Convention and the Hague Protocol and reasoned that the United States and South Korea had agreed to be bound by all of the provisions of the Original Warsaw Convention to which they both adhered. See Chubb & Son, Inc. v. Asiana Airlines, 1998 WL 647185, at *2-*3 (S.D.N.Y. Sept.22, 1998). The court observed that States that adhere to a multilateral treaty enter into treaty relations with the other States that adhere to the treaty, regardless of whether those States adhere to the treaty contemporaneously. See id. at *5 Thus, according to the court, the United States and South Korea entered into treaty relations when South Korea adhered to the amended version of the treaty. See id. at *6.

In reaching this conclusion, the court relied on In re Korean Air Lines Disaster of September 1, 1983, 664 F.Supp. 1463 (D.D.C.1985), aff'd, 829 F.2d 1171 (D.C.Cir.1987), aff'd sub nom. Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989), [FN2] and Hyosung (America), Inc. v. Japan Air Lines, Ltd., 624 F.Supp. 727 (S.D.N.Y.1985), the only two cases that discuss the existence of treaty relations between the United States and South Korea with regard to international carriage by air. See Chubb, 1998 WL 647185, at *6. The court interpreted both cases to hold that treaty relations between the United States and South Korea existed to the extent of those portions of the Original Warsaw Convention to which

they both adhered, i.e., the Truncated Warsaw Convention. See id. at *5. The court noted, however, that unlike this case, the courts in Korean Air Lines Disaster and Hyosung were not confronted with the invocation of articles that had been amended by the Hague Protocol. See id. at *6 ("To be sure, the substantive legal issues in Korean Air Lines Disaster and Hyosung involved only unamended portions of the Convention, and as such differ from this case, where one party seeks to rely on a Convention provision that was, in fact, amended by the Protocol."). [FN3] In this case, Chubb invoked Article 8(c) of the Original Warsaw Convention, which was substantively amended by the Hague Protocol to remove the requirement of disclosing all "additional stopping places" on an air waybill. See International Air Transport Association, Principal Instruments of the Warsaw System 8 (3d ed.1991) (comparing Original Warsaw Convention to Hague Protocol).

FN2. The conclusion of the district court in Korean Air Lines Disaster regarding treaty relations between the United States and South Korea was not challenged or addressed on direct appeal to the Court of Appeals for the District of Columbia Circuit or in the Supreme Court.

FN3. This observation was incorrect as to Korean Air Lines Disaster, where the court was confronted with a provision substantively amended by the Hague Protocol. See Korean Air Lines Disaster, 664 F.Supp. at 1474-75 (applying original Article 3 despite that it was amended by the Hague Protocol).

Article 18 of the Original Warsaw Convention, which provided that the carrier shall be liable for damages sustained in the event of loss of goods, had not been amended. See id. at 16. Article 22 had been amended in form, but retained the same liability limitation. See id. at 18-20. Despite that Article 8(c) of the Original Warsaw Convention was implicated by the facts and invoked by the plaintiff in this case, because it had been amended, the court held that Article 8(c) was not part of the agreement between the United States and South Korea and therefore could not be invoked by Chubb. See Chubb, 1998 WL 647185, at *6-*7. Thus, under the Truncated Warsaw Convention created by the district court, Article 18 created the cause of action, and Article 22(2) limited Asiana's liability to $20.00 per kilogram of cargo lost. See id. The court did not discuss the possible prejudice to the United States or South Korea, or the parties, that may be caused by interpreting the actions of the United States and South Korea in this manner.

Chubb moved in the district court to certify for appeal the questions decided in the September 18, 1998 Memorandum & Order. On December 14, 1998, the district court certified the questions. By Mandate issued May 28, 1999, this Court granted Chubb's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

## II. DISCUSSION

### A. Relations between the United States and South Korea within the Warsaw Convention "System"

The Warsaw Convention "system" includes the various laws, treaties and individual contracts governing the international transportation of persons, baggage, and goods by air. No one treaty or contract governs the relationships of one State with other States. A single State might be bound to one version of the Warsaw Convention with one State, another version of the Warsaw Convention with another State, a separate bilateral treaty with another State, and a separate contract with a private party. See Korean Air Lines Disaster, 664 F.Supp. at 1469 (United States bound to at least a portion of Warsaw Convention with South Korea and bound to separate contract with Korean Air Lines); cf. In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988, 928 F.2d 1267, 1270 (2d Cir.1991) ("So much has been written concerning the Convention since its adoption over 50 years ago that we must take care not to get lost in a wilderness of words."). For purposes of this case, we are concerned only with the actions of the United States and South Korea.

In 1934, the United States adhered to the Original Warsaw Convention and the Senate ratified the treaty. The treaty entered into force for the United States on October 29, 1934. See United States Department of State, Treaties in Force 342 (1999); 49 Stat. at 3013. At the time the Senate ratified the treaty, the United States (and the world) was in the midst of the Great Depression and the liability provisions in the treaty were thought to provide some benefit to carriers, passengers, and shippers alike. See Jon P. Martin, Tseng v. El Al Israel Airlines, Ltd.: The Second Circuit Further Weakens the Warsaw Convention, 31 Conn. L.Rev. 297, 300 & nn. 14-17

(1998); Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L.Rev. 497, 499-500 & n. 12 (1967) (quoting Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934)). In order to help the then-fledgling air industry, Article 22 of the Original Warsaw Convention limited the liability of air carriers to $8,300 per passenger and $20 per kilogram of goods or baggage. See Original Warsaw Convention, supra, art. 22, 49 Stat. at 3019; Lockerbie, 928 F.2d at 1270-71 (discussing the goal of protecting infant airline industry). In exchange for this limitation, Article 20 created a rebuttable presumption of liability, and other articles created exceptions to Article 22's limited liability. Articles 8 and 9, for example, together created an exception where the air waybill did not contain certain "particulars." See Original Warsaw Convention, supra, arts. 8, 9, 20, 22, 49 Stat. at 3016-17, 3019.

With the growth of the world economy and the air industry, however, the liability limitation, and particularly the per-passenger limitation, became increasingly unpopular in this and other countries. In 1955, a conference convened at the Hague to resolve the question of whether the liability limits remained at an appropriate level. The result was the Hague Protocol. The Hague Protocol, inter alia, changed some outdated language, doubled the per- passenger liability limitation to $16,600, and removed most of the exceptions to limited liability for shippers of goods. See generally International Air Transport Association, supra.

The United States was not satisfied that the increase in per-passenger liability was sufficient, and did not ratify the Hague Protocol. See Treaties in Force, supra, at 342 n. 1; Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting Two Related Protocols to the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as Amended, Sen. Exec. Doc. No. B, 95th Cong., 1st Sess. V (1977) ("Message Transmitting Two Related Protocols "). On July 13, 1967, South Korea adhered to the Hague Protocol, but did not separately adhere to the Original Warsaw Convention. See id.; M.J. Bowman and D.J. Harris, Multilateral Treaties: Index and Current Status 202 (1984). In sum, in 1995 when this dispute arose, the United States had ratified the Original Warsaw Convention but not the Hague Protocol, while South Korea had adhered to the Hague Protocol but not the Original Warsaw Convention. [FN4]

FN4. In 1965, the United States announced that it would denounce the Original Warsaw Convention unless the liability limit was raised, by special contract or otherwise. See Korean Air Lines Disaster, 664 F.Supp. at 1466; Message Transmitting Two Related Protocols, supra, at VI. In response to the Notice of Denunciation, private air carriers agreed to raise the per-passenger liability limitation to $75,000, to submit to virtual strict liability, and not to avail themselves of the defenses in the Original Warsaw Convention (the "Montreal Intercarrier Agreement of 1966"). See id. The Montreal Intercarrier Agreement was a "special contract" and thus did not amend the Original Warsaw Convention. Because the

Montreal Intercarrier Agreement of 1966 affects only the international carriage of passengers by air, it does not affect this case.

After 1965, the United States made several failed attempts to adopt an amended version of the Original Warsaw Convention. It was not until September 28, 1998 that the United States finally ratified Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as amended by the Protocol done at the Hague on 28 September 1955, Sept. 25, 1975, Message Transmitting Two Related Protocols, supra, at 7- 17 ("Montreal Protocol No. 4"), and thereby acceded to the Warsaw Convention as amended by the Hague Protocol and as amended by Montreal Protocol No. 4. See id. art. XVII(2), S. Exec. Doc. No. B at 15. Because the actions giving rise to this suit occurred in 1995, Montreal Protocol No. 4 does not affect this case. See Restatement (Third) of the Foreign Relations of the United States § 322(1) (1986) (the "Restatement") ("[T]he provisions of an international agreement do not bind a party in relation to any act or fact that took place ... before the date of the entry into force of the agreement with respect to that party.").

[1] Whether this dispute arising out of the international carriage of goods by air is governed by a given substantive treaty, such as the Original Warsaw Convention or the Amended Warsaw Convention, depends on whether the places of departure and destination are within the territories of two contracting parties to that treaty. See Original Warsaw Convention, supra, art. 1(1)-(2), 49 Stat. at 3014 ("This

convention shall apply to all international transportation of persons, baggage, or goods ... [where], according to the contract made by the parties, the place of departure and the place of destination ... are situated ... within the territories of two High Contracting Parties...."); Amended Warsaw Convention art. 1(1)-(2) (Original Warsaw Convention art. 1(1)-(2), as amended by the Hague Protocol, supra, art. I, 478 U.N.T.S. at 373, 375) (same). In this case, the carriage occurred between South Korea and the United States. Thus, if South Korea and the United States are both parties to the same one of these substantive treaties, they are in a treaty relationship that governs this dispute.

[2] We determine whether States are parties to a substantive treaty by applying the customary international law of treaties, which governs the making, interpretation, amendment, modification, enforcement, etc., of treaties. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2). In some cases, the customary international law of a certain area is itself codified in a treaty. Such is the case with the customary international law of treaties, which to a large extent has been codified in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (the "Vienna Convention").

B. The Vienna Convention

In resolving the question of whether a treaty relationship exists between the United States and South Korea with regard to the

international carriage of goods by air, we apply the rules enunciated in the Vienna Convention. According to a widespread legal conviction of the international community, the Vienna Convention is largely a restatement of customary rules, "binding States regardless of whether they are parties to the Convention." Maria Frankowska, The Vienna Convention on the Law of Treaties Before United States Courts, 28 Va. J. Int'l L. 281, 286 (1988) (citing opinions of the International Court of Justice); see Vienna Convention, supra, 1155 U.N.T.S. at 333 (stating its purpose to be, inter alia, the "codification and progressive development of the law of treaties"). [FN5]

FN5. The Vienna Convention does not apply as a matter of treaty law in this case because (1) the United States never ratified the Vienna Convention, see Basic Documents in International and World Order § 1.15 (Burns H. Weston et al. eds., 2d ed. 1990) (showing that the United States signed but did not ratify and that South Korea ratified without qualification on April 27, 1977); and (2) the Vienna Convention is not retroactively applied to treaties in force, see Vienna Convention, supra, art. 4, 1155 U.N.T.S. at 334. The Vienna Convention may nevertheless be used as a guide to the customary international law of treaties before it became effective, because the customary international law it codified existed separately before the Vienna Convention. See id. (Convention applies prospectively "[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention.").

The United States recognizes the Vienna Convention as a codification of customary international law. The United States Department of State considers the Vienna Convention "in dealing with day-to-day treaty problems" and recognizes the Vienna Convention as in large part "the authoritative guide to current treaty law and practice." Frankowska, supra, at 298 (quoting Assistant Legal Advisor for Treaty Affairs at the Department of State and Secretary of State Roger's Report to the President, Oct. 18, 1971, 65 Dep't St. Bull. 684, 685 (1971)). In addition, the Department of State has stated that where it has not recognized the Vienna Convention as codifying customary international law, it has adopted it as customary law going forward. See id. at 300.

United States courts have also cited the Vienna Convention as an authoritative codification of customary international law. See Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 191, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (Blackmun, J., dissenting) (citing Article 31.1); Weinberger v. Rossi, 456 U.S. 25, 29 n. 5, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982) (citing Article 2(1)(a)); Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1296 n. 40 (11th Cir.1999) ("Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.") (quoting Kreimerman v. Casa Veerkamp S.A. de C.V., 22 F.3d 634, 638 n. 9 (5th Cir.1994)); Tseng v. El Al Israel Airlines, Ltd., 122 F.3d 99, 104-05 (2d Cir.1997) (citing Articles 31 and 32), rev'd on other grounds, 525 U.S. 155, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999); Haitian Ctrs. Council, Inc. v. McNary,

969 F.2d 1350, 1361-62 (2d Cir.1992) ("[P]rinciples of treaty construction are themselves codified, in Article 31 of the Vienna Convention.... We have previously applied the Vienna Convention in interpreting treaties, Day v. Trans World Airlines, Inc., 528 F.2d 31, 36 (2d Cir.1975) (Warsaw Convention), ... as has the United States Department of State."), rev'd on other grounds sub nom., Sale v. Haitian Ctrs., 509 U.S. 155, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993). In addition, the Restatement relies on the Vienna Convention as a codification of the customary international law of treaties, see Restatement Introduction ("[C]odification of branches of international law by international bodies ... have provided authoritative text as a source for restatement of some topics. This is the case, for example, with respect to the international law of treaties, largely codified in the Vienna Convention on the Law of Treaties."), and confirms that "[t]he international law restated here ... represents ... the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law," id.

[3] We therefore treat the Vienna Convention as an authoritative guide to the customary international law of treaties. Although a number of the Vienna Convention's provisions reflected "progressive development of international law" when the treaty was opened for signature in 1969, the parties do not dispute that the articles directly implicated in this case reflect customary international law as it was in 1967 when South Korea adhered to the Hague Protocol. Rather, the parties dispute the interpretation and application of these articles.

C. The United States and South Korea Are Not in a Treaty Relationship Pursuant to the Original Warsaw Convention

Article 40(5) of the Vienna Convention concerns the effect of becoming a party to a treaty after an amending agreement has entered into force: 5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
(a) be considered as a party to the treaty as amended; and
(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.
Vienna Convention, supra, art. 40(5), 1155 U.N.T.S. at 342.

Chubb argues that South Korea "bec[ame] a party to the treaty" by adhering to the Hague Protocol. By operation of Article 40(5)(b) then, South Korea would be considered a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement, in this case, the United States. See Dr. Rene H. Mankiewicz, The Liability Regime of the International Air Carrier 2 (1981) ("[T]he original Convention applies not only to carriage between countries parties to it, but also to carriage between a State that has ratified the Hague Protocol and a State that is a party only to the original Convention. It is immaterial whether the former State had previously ratified the original Convention...."). The language of Article 40(5) is ambiguous, however, as to the meaning of "becomes a party to the treaty." It is unclear whether a State may "become[ ] a party to the treaty" simply by adhering to the amending agreement or whether a State must adhere to the original treaty to "become[ ] a party to the treaty.". Compare id.

with Frankowska, supra, at 364-65 (arguing that Article 40(5)(b) applies only when a State adheres to the original treaty after it has been amended by fewer than all of the parties to the original treaty and does not apply when a State adheres to the treaty as amended because "[t]he drafters of article 40 did not contemplate such a situation, nor did the Vienna Convention commentators").

[4] Asiana argues that this Court need not determine the meaning of "becomes a party to the treaty" because South Korea expressed a "different intention" when it adhered to the Hague Protocol. We agree with Asiana that the parties to the Hague Protocol expressed an intention not to be bound to the Original Warsaw Convention. The Hague Protocol createda new treaty: "As between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the Warsaw Convention as amended at The Hague, 1955." Hague Protocol, supra, art. XIX, 478 U.N.T.S. at 387 (emphasis altered). Those States that adhered to the Hague Protocol specifically adhered to the Warsaw Convention as amended at the Hague, not the Original Warsaw Convention. See id. at art. XXIII(2), 478 U.N.T.S. at 387 ("Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.") (emphasis added). Thus, when South Korea adhered to the Hague Protocol, it indicated its intention not to be bound to the Original Warsaw Convention. Although it could have adhered separately to the Original Warsaw Convention, South Korea never exercised that option. South Korea is not

therefore in a treaty relationship with the United States pursuant to the Original Warsaw Convention. See Treaties in Force, supra, at 342 n. 1 ("Korea (Rep.) [is a party] to the convention as amended; the United States is not a party to the amending protocol."); cf. Korean Air Lines Disaster, 664 F.Supp. at 1469 ("[S]ince the Protocol came later than the Convention it essentially offered new nations a choice: adopt the Warsaw Convention as originally formulated in 1929 or adopt the amended version as formulated in 1955.").

D. The Actions of the United States and South Korea Did Not Create a Treaty Relationship

[5] Relying on the reasoning of Korean Air Lines Disaster and Hyosung, the court below held that ratification by the United States of the Original Warsaw Convention and adherence by South Korea to the Amended Warsaw Convention created a treaty relationship between the United States and South Korea consisting of the portions of each version of the treaty to which both countries agreed. See Chubb, 1998 WL 647185, at *6. We reject the reasoning of these courts because these holdings bind the parties neither [to] the original unamended Convention, nor to the Convention as amended by the Protocol, but rather to a third, hybrid treaty that does not in fact exist--one consisting of only those items from the original Convention that were not later amended by the Protocol.... [T]his a la carte approach ... effectively negates the agreement by the United States to those portions of the treaty to which Korea did not accede.

Chubb, 1998 WL 647185, at *6 (laying out Chubb's argument) (internal quotations and alterations omitted). Because the court below adopted the reasoning of Korean Air Lines Disaster and Hyosung, we address the reasoning of those cases in detail.

In Korean Air Lines Disaster, the defendant Korean Air Lines was carrying passengers between South Korea and the United States. Prior to the flight, Korean Air Lines had signed the Montreal Intercarrier Agreement. The plaintiffs argued that no treaty relationship existed between South Korea and the United States and further argued that the absence of a treaty relationship prevents the Court from exercising any of the Convention's provisions in favor of Defendant, Korean Air Lines, a corporate citizen of Korea. Instead, Plaintiffs would have the Court "enforce" the Montreal Agreement, as though it were a separate contract, without regard to the Warsaw Convention.

Korean Air Lines Disaster, 664 F.Supp. at 1468-69.

The court first stated that the Hague Protocol offered nations a choice to "adopt the Warsaw Convention as originally formulated in 1929 or [to] adopt the amended version as formulated in 1955." Id. at 1469. However, instead of either (1) finding that South Korea became a party to the Original Warsaw Convention and applying that treaty, or (2) finding that South Korea became a party to the Amended Warsaw Convention and dismissing the action for lack of subject matter jurisdiction, the court held that it had jurisdiction because the United States and South Korea were parties to the same treaty "[a]t least with respect to the unamended portions of the

Convention." Id. (emphasis added). Having made that holding for purposes of conferring jurisdiction, the court then proceeded to apply Article 3 of the Original Warsaw Convention, see id. at 1474-75 (quoting original Article 3), despite that Article 3 was substantively amended by the Hague Protocol, see International Air Transport Association, supra, at 4, and therefore was not an "unamended portion of the Convention."

To the extent that the Korean Air Lines Disaster court found the United States in treaty relations with South Korea with respect to the Original Warsaw Convention, we have already rejected that theory of jurisdiction. To the extent the court found the United States in treaty relations with South Korea with respect to the Truncated Warsaw Convention, or in that court's words, "the unamended portions of the Convention," as discussed below, we reject that as well.

In Hyosung, the plaintiff hired defendant Japan Air Lines to transport cargo from South Korea to the United States. The cargo was damaged, and the plaintiff sued under the Original Warsaw Convention alleging willful misconduct and negligence in the defendant's handling of the cargo. The defendant moved to dismiss for lack of subject matter jurisdiction, arguing that the dispute did not arise under a treaty of the United States for purposes of 28 U.S.C. § 1331 because no treaty relationship existed between the United States and South Korea with regard to the international carriage of goods by air. Hyosung, 624 F.Supp. at 727-28.

The court concluded that "adherence to the Hague Protocol includes adherence to the Convention." Id. at 728-29 (citing Article XXIII of the Hague Protocol and Korean Air Lines Disaster, 664 F.Supp. at 1469 ("Korea has chosen to adhere to the Hague Protocol and is therefore a High Contracting Party to the Warsaw Convention through those amendments.")). According to the court,

[s]ince each country has adhered to unamended portions, the Convention does provide the substantive law governing air carriage disputes concerning carriers from the Republic of Korea and the United States which are within the scope of these sections. To require Korea to execute the Convention in addition to the Protocol adopting the Convention would be to exalt the formality of treaty signatories over the substance of the two nations' agreement regarding this air carriage contract. Absent a finding that these unamended portions are inseverable from the rest of the treaty because of prejudice to either nation, the unamended sections will be considered a treaty agreement between the United States and Korea.

Id. at 729.

Requiring South Korea to execute the Original Warsaw Convention in addition to the Hague Protocol would not, however, "exalt the formality of treaty signatories over the substance of the two nations' agreement regarding" international carriage by air; it would create the agreement between the United States and South Korea. And that agreement would place South Korea in treaty relations with the United States as to the entire Original Warsaw Convention, not the Truncated Warsaw Convention fashioned by the court. Even if it could

be said that South Korea agreed to be bound by a subset of the Original Warsaw Convention when it adhered to the Hague Protocol, the United States did not agree to be bound by that same subset of provisions when it ratified the Original Warsaw Convention.

Article 17(1) of the Vienna Convention supports this conclusion that the United States is not in treaty relations with any State that adhered to only a portion of the Original Warsaw Convention. Article 17(1) states that "the consent of a state to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree." Vienna Convention, supra, art. 17(1), 1155 U.N.T.S. at 336; Restatement § 312 cmt. f ("A state may consent to be bound by part of an agreement only, if that is permitted by the agreement or if the other contracting states consent."). The Original Warsaw Convention does not provide for partial adherence and the United States has not consented to partial adherence by any State, including South Korea. Under Article 17(1) of the Vienna Convention then, partial adherence by South Korea to the Original Warsaw Convention has no effect vis-a- vis the United States, and did not create treaty relations between the United States and South Korea.

The Hyosung court rejected the argument that Article 17(1) dictated that the United States and South Korea were not in treaty relations with regard to a portion of the Original Warsaw Convention, reasoning that Article 17(1) was inapplicable because the issue was "not whether it is proper to allow one state to adhere to a portion of a treaty but whether both states'

adherence to portions of a treaty may be deemed to constitute an agreement between those two nations." Hyosung, 624 F.Supp. at 729. This reasoning ignores that the United States did not adhere to a portion of a treaty when it ratified the Original Warsaw Convention; it adhered to an entire treaty that encompassed an entire liability scheme.

In short, there seems to be little, if any, authority for [the Hyosung court's] theory in the law of treaties. In fact, a general principle of international law--enunciated by the Permanent Court of International Justice in The Lotus-- prohibits any presumption of restrictions on the freedom of States, and thus points in the opposite direction. Unless it can be proven that a State consented to be bound by an international obligation, the presumption that it is not bound prevails.

Frankowska, supra, at 365. The court's creation of a Truncated Warsaw Convention simply is not supported by the customary international law of treaties.

[6] The creation of a Truncated Warsaw Convention is also a violation of the doctrine of the Separation of Powers. The treaty-making powers are vested in the executive and legislative branches of the United States Government, and not in the judicial branch. See U.S. Const. Art. II, § 2, cl. 2 ("[The President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties...."). Thus, "to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty." In re The Amiable Isabella, 19 U.S. (6 Wheat) 1, 71, 5 L.Ed. 191 (1821).

In creating a treaty, the Hyosung court and the court below impermissibly encroached on the treaty-making powers of the political branches.

The Hyosung court recognized that the executive branch of the United States Government maintained that South Korea was not in treaty relations with the United States with regard to international carriage by air because South Korea had adhered only to the Warsaw Convention as amended by the Hague Protocol. Hyosung, 624 F.Supp. at 729 (citing Civil Aeronautics Board, Aeronautical Statutes and Related Material 512 n. 2 (1974) (editor's note) and a letter written by Attorney Advisor on Treaty Affairs for the Department of State). The court, however, felt unconstrained by the Department of State's authority on the existence of treaty relations, apparently because the Department of State had not considered the reasoning of Article 40 of the Vienna Convention. See Hyosung, 624 F.Supp. at 729. The Hyosung court's choice to ignore the interpretation of the Department of State based on Article 40 of the Vienna Convention was "astounding under the circumstances." Frankowska, supra, at 364. First, the United States is not a party to the Vienna convention. Second, the Hyosung court misapplied Article 40 of the Vienna Convention. Third, the opinion of the Department of State on the existence of treaty relations should be taken into account regardless of whether it considered an article of a treaty not in force in the United States.

Put simply, "it is not within the province of the judiciary to alter the quid pro quo agreed to by the political branches [in the

Original Warsaw Convention.]" Korean Air Lines Disaster, 664 F.Supp. at 1475. The Supreme Court has stated that Articles 3, 4, 8, and 9 of the Original Warsaw Convention create substantive limits on Article 22 as part of a quid pro quo scheme of liability. See Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 131, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989) (on appeal from Korean Air Lines Disaster, 829 F.2d 1171). [FN6] In Chan, the Supreme Court addressed the required form of a passenger ticket under the Original Warsaw Convention, as modified by the Montreal Intercarrier Agreement. Id. at 125-26, 109 S.Ct. 1676. The focus of the case was whether Article 3 of the Original Warsaw Convention permitted a carrier to retain the benefit of limited liability after delivering a passenger ticket with undersized typeface. Id. at 126-28, 109 S.Ct. 1676. In making that determination, the Court compared Article 3 (passenger ticket requirements) with Article 4 (baggage claim check requirements) and Articles 8 and 9 (air waybill requirements). The Court noted that Articles 3, 4, 8, and 9 all

FN6. As noted earlier, the issues discussed herein were not raised or addressed on appeal.

provide ... that if the relevant document (ticket, baggage check or air waybill) has not been delivered (or, in the case of air waybill, "made out"), the carrier "shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability".... [U]nlike [Article 3, however, the other Articles] specifically impose [that] sanction for failure to include in the documents certain particulars....

Id. at 131, 109 S.Ct. 1676. It follows that a court cannot remove the particulars of Articles 4, 8, and 9 without altering fundamentally the character of the Original Warsaw Convention.

A review of the facts of this case illustrates how use of the Truncated Warsaw Convention violates the foregoing principle. The United States adhered to the Original Warsaw Convention, which, as the Magistrate Judge's Report and Recommendation indicated, would provide no limitation on liability because of Asiana's failure properly to include the particulars on the Waybill. By applying the Truncated Warsaw Convention, however, the district court placed the United States in a treaty that did provide limited liability, despite Asiana's failure to include the particulars. This Truncated Warsaw Convention lacks a provision to which the United States adhered--a fundamental alteration of the Original Warsaw Convention resulting in an entirely different outcome.

Like the Supreme Court, this Court has held that "[t]he Convention represents an entire liability scheme, and was intended to serve as a uniform, international law." Lockerbie, 928 F.2d at 1280. "The Convention's arbitrary limitations on liability ... are advantageous to the carrier. But the quid pro quo for this one-sided advantage is delivery to the passenger of a ticket [pursuant to Article 3] and baggage check [pursuant to Article 4] which give him notice...." Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508, 512-13 (2d Cir.1966), aff'd, 390 U.S. 455, 88 S.Ct. 1193, 20 L.Ed.2d 27 (1968). This reasoning applies with equal force to Articles 8 and 9. See Chan, 490 U.S. at 131, 109 S.Ct. 1676; Maritime Ins. Co. Ltd. v. Emery Air

Freight Corp., 983 F.2d 437, 439 (2d Cir.1993) (discussing articles 8 and 9); Tai Ping Ins. Co., Ltd. v. Northwest Airlines, Inc., 94 F.3d 29, 33 (2d Cir.1996) (same).

In Maritime, this Court addressed the particulars of Article 8 of the Original Warsaw Convention and held that because the waybill was missing the "agreed stopping places" particular specified in Article 8(c), the carrier was not permitted to limit its liability. See Maritime, 983 F.2d at 441. The Court stated that this reading of the treaty might not be sensible but the Court was nevertheless constrained by it because"[e]ven if a judicial interpretation is 'sensible,' 'to engraft such an interpretation onto the plain language of [the Warsaw Convention] would require an impermissible judicial amendment of the Convention.' " Id. at 440 (quoting Victoria Sales Corp. v. Emery Air Freight, Inc., 917 F.2d 705, 708 (2d Cir.1990)). In so stating, the Court relied on the reasoning of Justice Story in In re The Amiable Isabella that " 'to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.' " Maritime, 983 F.2d at 440 (quoting Isabella, 19 U.S. (6 Wheat) at 71) (emphasis added). In Tai Ping, this Court reiterated the importance of maintaining the quid pro quo of Articles 8, 9 and 22, even though it has become commercially unreasonable:

We recognize that it appears onerous to deprive Northwest of limited liability protection under Article 9 for its failure to include the agreed stopping places as required by Article 8(c).... The plain language of Article 9 does not make the loss of

limited liability protection contingent on prejudice to the shipper or consignee.... Although this may seem commercially unreasonable today, "to engraft such an interpretation onto the plain language of [Article 9] would require an impermissible judicial amendment of the Convention."

Tai Ping 94 F.3d at 33-34 (quoting Victoria Sales, 917 F.2d at 708).

In sum, no precedent in international law allows the creation of a separate treaty based on separate adherence by two States to two different versions of a treaty, and it is not for the judiciary to alter, amend, or create an agreement between the United States and other States. The Original Warsaw Convention created a liability scheme including quid pro quo provisions that cannot be severed without substantially changing the very scheme to which the political branches of the United States agreed. Rewriting the Original Warsaw Convention to omit the "agreed stopping places" requirement impermissibly encroaches upon the treaty-making power reserved to the political branches.

## III. CONCLUSION

For the foregoing reasons, we hold that the actions of the United States and South Korea did not create treaty relations with regard to the international carriage of goods by air and the court below erred in concluding otherwise. Because we find that the United States and South Korea are not in treaty relations with regard to the international carriage of goods by air, this dispute does not arise under a treaty of the United

States and the district court is thereby deprived of subject matter jurisdiction. The judgment of the district court is therefore reversed, and the case is remanded for further proceedings to determine whether there exists some other ground for subject matter jurisdiction.

## APPENDIX 2

**Memorandum and Order of the District Court**

No .96 Civ. 5082 (LAP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CHUBB & SON, INC., a/s/o SAMSUNG SEMICONDUCTOR, Plaintiff,

-against-

ASIANA AIRLINES, Defendant.

September 18, 1998, Decided

September 22, 1998, Filed

**COUNSEL:**

For CHUBB & SON, INC., plaintiff: John K McElligott, Donovan Parry Walsh etc, New York, NY.

For ASIANA AIRLINES, defendant: Christopher Carlsen, Condon & Forsyth, New York, NY.

**JUDGE:**

Before: PRESKA, LORETTA A., United States District Judge.

**OPINION:**

**MEMORANDUM AND ORDER**

Plaintiff Chubb & Son, Inc., a/s/o Samsung Semiconductor ("Chubb"), brings this action against defendant Asiana Airlines ("Asiana") seeking recovery for the loss of two parcels of computer chips that were to have been shipped from Seoul, South Korea to San Francisco, California. Asiana has filed a supplemental motion for partial summary judgment that Article 8(c) of the Warsaw Convention does not comprise part of the treaty agreement between the United States and the Republic of Korea and as such does not govern the air transportation involved in this case. For the reasons set forth below, Asiana's motion is granted.

I. BACKGROUND

A. Facts

Asiana, a South Korean corporation, agreed to ship seventeen parcels of computer chips from Seoul, South Korea, to San Francisco, California, on behalf of Samsung Electronics, a South Korean Corporation, pursuant to Asiana air waybill No. 988-0497-2951. n1 (Chubb 3(g) P 1; Asiana 3(g) P 1 & Exh. A). The waybill provided that shipment would be made on Asiana Flight 214 on August 10, 1995, from an airport in Seoul to an airport in San Francisco; the waybill did not refer to any

other stops en route. (Chubb 3(g) PP 4-9; Asiana 3(g) P 2 & Exh. A). As it turns out, the cargo was actually transported on Asiana Flight 202 from Seoul to Los Angeles and was thereafter trucked from Los Angeles to San Francisco. (Chubb 3(g) P 11; Asiana 3(g) PP 4-5). Upon delivery in San Francisco, two of the seventeen parcels were missing; neither party has been able to determine precisely when or where the loss occurred. (Asiana 3(g) P 13).

n1 In resolving this motion I have considered the following submissions: Rule 3(g) Statement of Chubb & Son, Inc. dated February 14, 1997 ("Chubb 3(g)"); Rule 3(g) Statement of Asiana Airlines dated February 28, 1997 ("Asiana 3(g)"); Supplemental Rule 3(g) Statement of Asiana Airlines dated November 11, 1997 ("Asiana Supp. 3(g)"); Affidavit of Christopher Carlsen in Support of Asiana's Supplemental Motion for Partial Summary Judgment ("Carlsen Aff."); Supplemental Rule 56.1(b) Statement of Chubb & Son, Inc. ("Chubb Supp. 56.1"); Affidavit of John K. McElligott in Opposition to Supplemental Motion for Partial Summary Judgment ("McElligott Aff.").

B. Procedural History

Operating under the assumption that their dispute was governed by the Convention for the Unification of Certain Rules Relating to International Transportation by Air (the "Warsaw Convention" or "Convention"), *49 U.S.C. § 1502* note (1976), the parties cross-moved for partial summary judgment as to whether Asiana could avail itself of the liability limitation set forth at Article 22(2) of the Convention. That

provision limits an air carrier's liability to a maximum sum of $ 20.00 per kilogram of cargo lost or damaged, unless the consignor makes a special declaration of value and pays a supplementary sum. Although Asiana claimed it was entitled to the limitation, Chubb maintained that Asiana's air waybill violated the "stopping places" requirement found in Article 8(c) of the Convention. That requirement mandates that the waybill for the transportation contain, among other things, "the agreed stopping places ...." Convention, art 8(c). Chubb further argued that under Article 9, the Article 8(c) violation precluded Asiana from cloaking itself in the protection afforded by Article 22(2). Magistrate Judge Peck issued a Report and Recommendation recommending that Chubb's motion be granted, and Asiana's denied.

While the parties' Rule 72(b) objections to the Report and Recommendation were pending, Asiana sought leave to file a supplemental motion for summary judgment that questioned whether and to what extent the United States and Korea were in treaty relations with regard to international aviation. In particular, Asiana claimed that because the United States ratified only the original Warsaw Convention, and Korea adhered to the Convention only as amended by the Hague Protocol, the two countries are in treaty relations only as to those portions of the Convention that were unamended by the Hague Protocol. Asiana contends that because the Convention's Article 8(c) stopping places requirement was amended by the Protocol, the requirement has no place in this action and Chubb's basis for stripping Asiana of the liability limitation is misplaced. Because this issue potentially affected subject matter jurisdiction, I granted leave and resolve the motion now.

## II. DISCUSSION

### A. The Treaties

Because this motion involves the interplay between the Warsaw Convention and the Hague Protocol, some background information on those agreements is useful. The Warsaw Convention "is a multilateral treaty intended to uniformly regulate international airline transportation." *In re Korean Air Lines Disaster of Sept. 1, 1983, 664 F. Supp. 1463, 1464 (D.D.C. 1985)*, aff'd, *265 U.S. App. D.C. 39, 829 F.2d 1171 (D.C. Cir. 1987)*, aff'd sub nom *Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 104 L. Ed. 2d 113, 109 S. Ct. 1676 (1989)*. As the Court of Appeals has observed, the Convention had two primary goals: "first, to establish uniformity in the aviation industry with regard to 'the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims,' as well as with regard to documentation such as tickets and waybills; second -- clearly the overriding purpose -- to limit air carriers' potential liability in the event of accidents." *Air Disaster at Lockerbie v. Pan American World Airways, 928 F.2d 1267, 1270 (2d Cir. 1991)* (quoting Andreas T. Lowenfeld & Allan I. Mendehlsohn, The United States and the Warsaw Convention, *80 Harv. L. Rev. 497, 498-99 (1967))*. The second purpose -- liability limitation -- was achieved through Article 22(1), which originally limited the potential liability of air carriers in the event of accidents to approximately $ 8,300. The United States ratified the Convention in 1934. Id. Relevant here, the Republic of Korea did not ratify the Convention. Id.

Although the United States was satisfied with the liability limitation at the time the Convention was ratified (which was during the Great Depression), "since that time and especially with the growth of the air industry to its present proportions, the limitation has become an increasingly uncomfortable and unpopular proposition." *Korean Air Lines Disaster, 664 F. Supp. at 1465.* As a result, "while the limitation was once accepted, it has constantly been the focus of debate and disagreement," and the United States in particular has not been happy with the low limits placed on air carrier liability. Id.

The discussion continued until another conference met at the Hague in 1955 to "resolve the debate concerning whether the liability limits had been set at an appropriate level." Id. (citing Lowenfeld & Mendelsohn, *80 Harv. L. Rev. at 504).* The Hague Conference, therefore, "had a limited purpose with the intent being to retain uniformity in the rules and conditions expressed in the Warsaw Convention while resolving the dissatisfaction with the low limits of liability." Id. at 1465-66 (citing S. Speiser & C. Krause, 1 Aviation Tort Law, § 11:18 (1978)). To this end the conferees created the Protocol to Amend the Convention of the Unification of Certain Rules Relating to International Carriage by Air (the "Hague Protocol" or "Protocol"), which doubled the liability limitation to approximately $ 16,600. In addition, the Protocol amended other limited portions of the Convention, including Convention Article 8(c), which, as noted above, had mandated that the air waybill contain, among other things, "the agreed stopping places ..." of the journey. Convention, art 8(c). The Protocol eliminated this requirement, requiring only that the waybill list

the places of departure and destination. See Hague Protocol Art. VI.

The Republic of Korea ratified the Hague Protocol on July 13, 1967. See M.J. Bowman & D.J. Harris, Multilateral Treaties: Index and Current Status 202 (1984). The United States remained dissatisfied with the low liability limit, however, and never ratified the Protocol. n2 See *Hyosung v. Japan Air Lines, 624 F. Supp. 727, 728 (S.D.N.Y. 1985);* Treaties in Force 323-324.

n2 The United States persisted in its dissatisfaction and in 1965 even threatened to disavow the Convention. This threat led to the Montreal Agreement among air carriers, which is deemed a "special contract" under the Convention, rather than an amendment to the Convention. Through the Montreal Agreement air carriers agreed to submit to virtually strict liability and to raise the liability limit to $ 75,000. Korean Air Lines Disaster, 664 F. Supp. at 1466.

In sum, then, the United States has ratified the Convention but not the Protocol, while Korea has ratified the Protocol but not the Convention. The consequences of this state of affairs are discussed below.

B. Case Law on the Existence of Treaty Relations Between the United States and Korea

Two cases have addressed the state of treaty relations between the United States and Korea in light of the Warsaw Convention and Hague Protocol: *In re Korean Air Lines Disaster of Sept. 1, 1983, 664 F. Supp. 1463, 1464 (D.D.C. 1985),* aff'd, *265 U.S. App. D.C. 39, 829 F.2d 1171 (D.C. Cir. 1987),* aff'd sub nom *Chan v. Korean Air Lines, Ltd., 490 U.S.*

*122, 104 L. Ed. 2d 113, 109 S. Ct. 1676 (1989)*, and *Hyosung v. Japan Air Lines, 624 F. Supp. 727, 728 (S.D.N.Y. 1985)*. In each case the court had to evaluate whether these agreements established treaty relations between the United States and Korea so as to justify subject matter jurisdiction under *28 U.S.C. § 1331*.

In Korean Air Lines Disaster, plaintiffs' decedents were victims of the tragic 1983 commercial airline disaster in which Soviet military aircraft destroyed an airliner owned and operated by defendant *Korean Air Lines. 664 F. Supp. at 1464*. In their attempt to evade the liability limitations, plaintiffs argued, inter alia, that the Convention did not apply because "Korean Air Lines, a corporate citizen of a nation not a party to the Warsaw Convention, has no standing to avail itself of the defenses contained in the Warsaw Convention." *664 F. Supp. at 1467*. Plaintiffs reasoned that because Korea adheres to the Protocol and the United States to the Convention, each country is party to a treaty that the other never ratified; as such, they argued, there is no treaty relationship between Korea and the United States. Id.

The court "rejected Plaintiffs' contention that there is no treaty relationship between the United States and Korea." *664 F. Supp. at 1469*. The court dismissed the argument that the Convention and the Protocol were separate treaties, finding such an argument to "ignore the development of the Warsaw system," which made clear that the Protocol consisted only of a list of amendments to the Convention and as such could not be considered a stand-alone treaty. Id.

The court recognized that "the purpose of the Warsaw Convention was to unify the rules; the purpose of the Hague

Protocol was merely to amend those same rules." Indeed, to this effect Protocol Article XXIII provides that "adherence to this Protocol by any State which is not a party to the Convention shall have the effect of adherence to the Convention as amended by the Protocol." Hague Protocol Art. XXIII. As such, the court observed because "Korea has chosen to adhere to the Hague Protocol," it is "therefore a High Contracting Party to the Warsaw Convention through those amendments." 664 F. Supp. at 1469.

Thus, in light of the Warsaw system's development and the Protocol's own language, the court held that "at least with respect to the unamended portions of the Convention, the United States and Korea are parties to the same treaty." *664 F. Supp. at 1469.* The court added that such an interpretation was consistent with the overall purpose of the Convention, as "it would hardly encourage the goal of the Warsaw Convention to establish uniform rules, law and procedure for claims arising out of international aviation and then to complicate the application of those rules by requiring reciprocity in ratification." *664 F. Supp. at 1469.* The court summarized this point by noting that "the Convention is not concerned with reciprocal treatment of nationals; its purpose is to unify rules relating to international transportation by air." *664 F. Supp. at 1469* (citing 1 Aviation Tort Law § 11:15.

Hyosung is even more relevant to the instant case. There, plaintiff hired defendant to transport cargo from *Korea to the United States. 624 F. Supp. at 727.* When the plaintiff sued, alleging defendant's willful misconduct and negligence in its handling of the cargo, the defendant moved to dismiss for lack of subject matter jurisdiction. Plaintiff argued that treaty

jurisdiction was proper under *28 U.S.C. § 1331* because the Convention governed the parties' rights and responsibilities. As the court framed the issue, it was "necessary to determine whether or not Korea's adherence to the Hague Protocol without signing the Convention places that country in treaty relations with the United States, a country that signed only the original version of the Warsaw Convention." Id.

Following the reasoning set out in Korean Air Lines Disaster, and also citing Article XXIII of the Protocol, the Hyosung court concluded that because the Protocol was intended to supplement and amend, rather than supplant, the Convention, the Protocol could not be deemed independent of the Convention; as a result, "adherence to the Hague Protocol includes adherence to the Convention." *624 F. Supp. at 728* (citing Hague Protocol Art. XXIII). Because both the United States and Korea each had adhered to those portions of the Warsaw Convention that were not amended by the Hague Protocol, i.e., they were in agreement as to those portions of the Convention as to which they had independently assented, they could be said to have treaty relations as to those terms. As the Court noted,

> Since each country has adhered to unamended portions, the Convention does provide the substantive law governing air carriage disputes concerning carriers from the Republic of Korea and the United States which are within the scope of these sections .... Absent a finding that these unamended portions are inseverable from the rest of the treaty because of prejudice to either nation, the unamended sections will be considered a treaty agreement between the United States and Korea.

*Id. at 729.*

Although the Hyosung defendants argued that the lack of reciprocal ratification demonstrated that no treaty relations existed between the countries, n3 the court disagreed. It noted that "the particularities of multilateral treaty negotiation and ratification permit two nations to agree substantially on a treaty which has been amended in the interim between each country's ratification." *624 F. Supp. at 729.*

n3 I note that the Hague Protocol did not amend the jurisdictional provisions of the Warsaw Convention; jurisdiction is thus proper under *28 U.S.C. § 1331.* See *Hyosung, 624 F. Supp. at 729* (noting that "the Hague Protocol amended only certain limited provisions of the Convention and those provisions do not affect the question of jurisdiction at issue here"); Korean Air Lines Disaster, 664 F. Supp. at 1469.

The court also rejected defendants' argument that Article 17(1) of the Vienna Convention dictated that no treaty relations existed. Article 17(1) provides that "the consent of a state to be bound by part of a treaty is effective only if the treaty so permits or the other contracting states so agree." Vienna Convention on the Law of Treaties, May 23, 1969, art 17(1), 1155 U.N.T.S. 331. The court deemed this provision inapplicable, because the issue was "not whether it is proper to allow one state to adhere to a portion of a treaty but whether both states' adherence to portions of a treaty may be deemed to constitute an agreement between those two nations." Id. The court found that such dual adherence could constitute an agreement, so long as no inequity

or prejudice would flow from permitting joint adherence to a portion of a treaty. Id. Finding no prejudice, and noting that the jurisdictional question involved only provisions as to which the countries agreed, the court concluded that it was appropriate to apply those provisions of the treaty as to which the countries had independently assented.

Like the Korean Air Lines Disaster court, the Hyosung court further reasoned *15] that such "expansive" treatment of multilateral agreements ensures the "widest possible participation" in a multilateral treaty and is consistent with the goals of the Convention, which "sought to provide the uniform regulation of air coverage throughout the world." *624 F. Supp. at 729* (citing *Korean Air Lines Disaster, 664 F. Supp. at 1469).*

The cause of action in Hyosung stood because, as the court explained,

> the Articles of the Convention which give rise to a cause of action for damages have not been amended by the Hague Protocol and thus are included in the agreement between the United States and Korea, thereby satisfying the requirement of *28 U.S.C. Section 1331* that a treaty must provide a private right of action before jurisdiction attaches.

Id. at 730.

In sum, both cases considered whether and to what extent international aviation treaty relations existed between the United States and Korea. In each case the court found that treaty relations existed with regard to those portions of the Convention that were unamended by the Protocol.

C. Application

As noted above, the waybill in this case listed only Seoul, South Korea (the place of departure) and San Francisco (the place of destination). Chubb argued, and Magistrate Judge Peck agreed, that the airbill violated Article 8(c) because by failing to list Los Angeles -- the place where the plane actually landed -- the waybill did not contain "the agreed stopping places ...." In light of Article 8(c) deficiency, Article 9 thus prevented Asiana from availing itself of the liability limitation contained in Article 22(2).

Relying on Korean Air Lines Disaster and Hyosung, however, Asiana argues that the United States and Korea are in treaty relations only as to those portions of the Convention that were not amended by the Hague Protocol. Because Convention Article 8(c) was amended by the Protocol, it does not constitute part of the treaty agreement between the nations and thus may not govern the parties' rights and responsibilities.

Chubb attempts to argue that the countries must be deemed parties only to the original, unamended Convention and that holding otherwise would in effect bind the parties neither the original unamended Convention, nor to the Convention as amended by the Protocol, but rather to a third, hybrid treaty that does not in fact exist -- one consisting of only those items from the original Convention that were not later amended by the Protocol. Chubb derides this a la carte approach, arguing that it effectively "negate[s] the agreement by the United States to those portions of the treaty to which Korea did not accede." (Chubb Mem. in Opp. To Asiana Supp. Mot. For Sum. Judgment. at 12). n4

n4 Chubb contends also that Asiana should be precluded from arguing in this action that there are truncated treaty relations between the United States and Korea because counsel for Asiana may have taken inconsistent positions in past, unrelated, litigation. Putting aside whether or not the positions counsel advances here are in fact inconsistent with the positions they have taken elsewhere, I find Chubb's argument unavailing.

To be sure, the substantive legal issues in Korean Air Lines Disaster and Hyosung involved only unamended portions of the Convention, and as such differ from this case, where one party seeks to rely on a Convention provision that was, in fact, amended by the Protocol. Nonetheless, the reasoning of Korean Air Lines Disaster and Hyosung remains persuasive, and I am inclined to accept the conclusion that the treaty relationship between the United States and Korea consists of only those portions of the Warsaw Convention that were not amended by the Hague Protocol.

The view of the treaty relations adopted in Korean Air Lines Disaster and Hyosung is consistent with the goals of the Convention in its attempt to unify rules of international air carriage. Moreover, this holding binds neither party to anything more than the provisions to which they had already previously agreed, a conclusion consistent with multilateral treaty formation, which allows two countries "to agree substantially on a treaty which has been amended in the interim between each country's ratification." *Hyosung, 624 F. Supp. at 729.* I hold that the treaty between the United States and Korea consists only of those portions of the Warsaw Convention that were unamended by the Hague Protocol.

That Article 8(c) does not fall within the realm of the countries' agreement does not mean that there is no agreement at all. To the contrary, many essential elements of the Convention, including those on jurisdiction and liability limitation, were unamended. As the Hyosung court noted, "since each country has adhered to unamended portions, the Convention does provide the substantive law governing air carriage disputes concerning carriers from the Republic of Korea and the United States which are within the scope of these sections." *624 F. Supp. at 729.* Moreover, "the Articles of the Convention which give rise to a cause of action for damages have not been amended by the Hague Protocol and thus are included in the agreement between the United Sates and Korea." *Id. at 730.*

As to plaintiff's claims here, Article 18 of the Warsaw Convention gives rise to the cause of action providing that the carrier shall be liable for damages sustained in the event of loss of goods. Because Article 18 was not amended by the Hague Protocol, it forms part of the treaty relations between the United States and Korea.

Convention Article 22(2), upon which Asiana relies to restrict its liability, limits an air carrier's liability to a maximum sum of $ 20.00 per kilogram of cargo lost or damaged, unless the consignor makes a special declaration of value and pays a supplementary sum. See *Exim Indus., Inc. v. Pan American World Airways, Inc., 754 F.2d 106, 107 (2d Cir. 1985).* While the Protocol reworded Article 22(2), it retained the same liability limitation, and the limitation constitutes a part of the agreement between the United States and Korea. See Warsaw

Convention Art. 22; Hague Protocol Art. XXII. Here, Chubb has alleged that two cartons, weighing 34.3 kgs. each, were not delivered. Asiana 3(g) PP 11, 15. As a result, Asiana's liability under Article 22(2) would be not more than $ 706.

CONCLUSION

For the reasons stated above, Asiana's supplemental motion for summary judgment (Docket No. 26) is granted. The parties' prior cross-motions for partial summary judgment (Docket Nos. 17 and 21) are denied as moot, and there is no need to consider Magistrate Judge Peck's Report and Recommendation or the parties' objections thereto.

The parties shall appear for a pre-trial conference in Courtroom 12A, 500 Pearl Street, on October 9, 1998, at 10:00 a.m.

**SO ORDERED:**

Dated: New York, New York
September 18, 1998
LORETTA A. PRESKA, U.S.D.J.

**APPENDIX 3**

**Report and Recommendation of the District Court**

**No. 96 Civ. 5082 (LAP)(AJP)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

**CHUBB & SON, INC.,**
**a/s/o SAMSUNG SEMICONDUCTOR, Plaintiff,**

**-against-**

**ASIANA AIRLINES, Defendant.**

**June 17, 1997, Decided**

**COUNSEL:**
For Plaintiff: John K. McElligott, Esq., Donovan, Parry, Walsh & Repetto, New York, NY.

For Defendant: Christopher Carlsen, Esq., Condon & Forsyth, New York, NY.

**JUDGES:**

Before: Peck, Andrew J., United States Magistrate Judge, and Preska, Loretta A., United States District Judge.

**OPINION:**

REPORT AND RECOMMENDATION

**ANDREW J. PECK, United States Magistrate Judge:**

**To the Honorable Loretta A. Preska, United States District Judge:**

Chubb & Sons, Inc., a/s/o Samsung Semiconductor ("Chubb"), has sued Asiana Airlines for the loss of 2 of 17 parcels of computer chips that were being shipped from Seoul, Korea to San Francisco. The parties agree that this action is governed by the Warsaw Convention. Both sides have cross-moved for partial summary judgment as to whether Warsaw Convention Article 22(2) limits Asiana's liability to $ 20 per kilogram, or $ 706 total for the two missing parcels. Chubb contends that because Asiana's air waybill listed the shipment as going from Seoul, Korea to San Francisco, and did not list Los Angeles as an "agreed stopping place," the waybill did not comply with Articles 8(c) and 9 of the Warsaw Convention, and hence the Convention's damage limitation is not available to Asiana. The Court agrees and recommends that Chubb's partial summary judgment motion be granted and Asiana's cross-motion be denied.

**FACTS**

Samsung Electronics in Seoul, Korea arranged to ship 17 parcels of computer chips to Samsung Semiconductor in San Jose, California. (Chubb 3(g) PP 2-3; Asiana 3(g) Ex. A: air waybill.) The cargo was shipped pursuant to Asiana air waybill No. 988-0497-2951. (Chubb 3(g) P 1; Asiana 3(g) P 1 & Ex. A.) The waybill provided that shipment would be from the airport in Seoul, Korea to the airport in San Francisco, California, on Asiana Flight 214 on August 10, 1995. (Chubb 3(g) PP 4-5; Asiana 3(g) P 2 & Ex. A.) The Asiana air waybill did not contain any information about any stopping places en route. (Chubb 3(g) PP 6-9; Asiana 3(g) Ex. A: air waybill, face and reverse side P 3.) The cargo actually was transported on Asiana Flight 202 from Seoul to Los Angeles, and trucked from Los Angeles to San Francisco. (Chubb 3(g) P 11; Asiana 3 (g) PP 4-5.)

Asiana's air waybill does provide that Asiana "may substitute alternate carriers or aircraft and may without notice and with due regard to the interest of the shipper substitute other means of transportation. Carrier is authorized to select the routing or to change or deviate from the routing shown on the face hereof." (Asiana 3(g) Ex. A: air waybill, reverse side P 8.2.) Additionally, Asiana's Tariff Rule 215, which is incorporated into the air waybill (id. P 2.2.3), provides that Asiana "will deviate from any route shown on the Air Waybill/Consignment Note, and will forward when necessary to expedite delivery via any other carrier or transportation agency. ..." (Carlsen 2/28/97 Aff. Ex. A: Asiana Tariff Rule 215.)

Asiana claims that Chul Kee, the General Manager of its Seoul Cargo District Office, verbally notified an unidentified agent of Samsung that since there was insufficient cargo space on Flight

214, Asiana would ship the cargo on Flight 202 to Los Angeles and truck it from Los Angeles to San Francisco; Chul Kee states that Samsung's agent agreed to these changes. (Asiana 3(g) PP 6, 7; Chul Kee Aff. PP 1, 4, 5.) Chubb denies that Samsung received such notification or agreed to this manner of shipment. (Chubb 3(g) PP 16-17; Chubb Counter 3(g) PP 1-2.) Asiana also asserts, and Chubb contests, that changing the air waybill at that late point would have been "extremely difficult" because the air waybill has so many copies going to different entities. (Compare Asiana 3(g) PP 9, 10 and Chul Kee Aff. P 7 with Chubb Counter 3(g) PP 4-5 and Chubb Br. at 8-9.)

The shipment consisted of 17 boxes of computer chips, each box weighing 17.65 kilograms. (Chubb 3(g) P 14; Asiana 3(g) PP 11-12 & Ex. A.) Apparently, only 15 boxes arrived in San Francisco. (Compare Chubb 3(g) P 15 with Asiana 3(g) PP 12-13, 18.) The two allegedly missing cartons (weighing 35.3 kilograms) have not been located and it is unclear during which portion of the trip the loss occurred, although Asiana claims that all 17 boxes were received by the trucker, Air Container Transport ("ACT"), in Los Angeles. (Asiana 3(g) PP 13, 15; McElligott 2/14/97 Aff. P 11 & Ex. C: ACT Bill of Lading; Carlsen 11/8/96 Aff. PP 4-6, 11 & Ex. D: ACT Pickup Form.) If the Warsaw Convention limitation of liability of $ 20 per kilogram applies, Asiana's liability is limited to $ 706 (35.3 kilograms times $ 20 per kilogram). (Asiana 3(g) P 15.) The total value of the missing cargo is claimed to be $ 583,000. (McElligott 2/14/97 Aff. P 6.)

**ANALYSIS**

**SUMMARY JUDGMENT STANDARDS**

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also, e.g., *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986); Lang v. Retirement Living Pub. Co., 949 F.2d 576, 580 (2d Cir. 1991); Hernandez v. New York City Law Dep't Corp. Counsel, 1997 U.S. Dist. LEXIS 620, 94 Civ. 9042, 1997 WL 27047* at *6 (S.D.N.Y. Jan. 23, 1997) (Peck, M.J.); *Burger v. Litton Indus., Inc., 1996 U.S. Dist. LEXIS 5560, 91 Civ. 0918, 1996 WL 421449* at *7 (S.D.N.Y. April 25, 1996) (Peck, M.J.), report & rec. adopted by, *1996 U.S. Dist. LEXIS 15602, 1996 WL 609421* (S.D.N.Y. Oct. 22, 1996). The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment. See, e.g., *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970); Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 36 (2d Cir. 1994); Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994); Hernandez v. New York City Law Dep't Corp. Counsel, 1997 U.S. Dist. LEXIS 620,* *17, *1997 WL 27047* at *6; *Burger v. Litton, 1996 U.S. Dist. LEXIS 5560, 1996 WL 421449* at *7.

In evaluating the record to determine whether there is a genuine issue as to any material fact, "the evidence of the non-movant

is to be believed, and all justifiable inferences are to be drawn in [his] favor." *Anderson v. Liberty Lobby, 477 U.S. at 255, 106 S. Ct. at 2513;* see also, e.g., *Chambers v. TRM, 43 F.3d at 36; Gallo v. Prudential, 22 F.3d at 1223; Hernandez v. New York City Law Dep't Corp. Counsel, 1997 U.S. Dist. LEXIS 620,* *18, *1997 WL 27047* at *6. The Court draws all inferences in favor of the nonmoving party only after determining that such inferences are reasonable, considering all the evidence presented. See, e.g., *Apex Oil Co. v. DiMauro, 822 F.2d 246, 252* (2d Cir.), cert. denied, *484 U.S. 977, 108 S. Ct. 489, 98 L. Ed. 2d 487 (1987); Hernandez v. New York City Law Dep't Corp. Counsel, 1997 U.S. Dist. LEXIS 620, 1997 WL 27047* at *6; *Burger v. Litton, 1996 U.S. Dist. LEXIS 5560, 1996 WL 421449* at *7. "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Chambers v. TRM, 43 F.3d at 37;* see also, e.g., *Hernandez v. New York City Law Dep't Corp. Counsel, 1997 U.S. Dist. LEXIS 620,* *18, *1997 WL 27047* at *6.

In considering a motion for summary judgment, the Court is not to resolve contested issues of fact, but rather is to determine the existence of any disputed issues of material fact. See, e.g., *Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987); Knight v. United States Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986),* cert. denied, *480 U.S. 932, 107 S. Ct. 1570, 94 L. Ed. 2d 762 (1987); Ruiz v. Selsky, 1997 U.S. Dist. LEXIS 3473, 96 Civ. 2003, 1997 WL 137448* at *3 (S.D.N.Y. March 24, 1997) (Peck, M.J.). To evaluate a fact's materiality, the substantive law determines which facts are critical and

which facts are irrelevant. E.g., *Anderson v. Liberty Lobby, 477 U.S. at 248, 106 S. Ct. at 2510.* While "disputes over facts that might affect the outcome of a suit under the governing law will properly preclude the entry of summary judgment[,] factual disputes that are irrelevant or unnecessary will not be counted." Id. (citations omitted); see also, e.g., *Knight, 804 F.2d at 11-12; Shaw v. City of New York, 1997 U.S. Dist. LEXIS 4901, 95 Civ. 9325, 1997 WL 187352* at *2 (S.D.N.Y. April 15, 1997) (Peck, M.J.); *Ruiz v. Selsky, 1997 U.S. Dist. LEXIS 3473, 1997 WL 137448* at *3.

**CHUBB'S PARTIAL SUMMARY JUDGMENT MOTION SHOULD BE GRANTED, AND ASIANA'S DENIED, BECAUSE ASIANA'S FAILURE TO LIST LOS ANGELES AS AN AGREED STOPPING PLACE ON THE AIR WAYBILL DEPRIVES ASIANA OF THE WARSAW CONVENTION'S LIABILITY LIMITATIONS PROTECTION**

Both parties agree that the Warsaw Convention governs the instant dispute. (See, e.g., Chubb Reply Br. at 1; Asiana Br. at 1-3.)

Article 22(2) of the Warsaw Convention limits the liability of carriers of goods such as Asiana:

> In the transportation of ... goods, the liability of the carrier shall be limited to a sum of [$ 20.00 per kilogram], unless the cosigner has made ... a special declaration of the value at delivery and has paid a supplementary sum if the case so requires.

*49 U.S.C. § 40105* [hereinafter "Warsaw Convention"], Article 22(2).

Article 8(c) of the Warsaw Convention requires the air waybill to contain, inter alia, "the agreed stopping places" for the shipment. Warsaw Convention, Article 8(c).

Article 9 of the Warsaw Convention provides that a carrier loses the Article 22(2) limitation of liability if its air waybill does not comply with Article 8(c)'s requirement to list all agreed stopping places:

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Warsaw Convention, Article 9.

Asiana's air waybill discloses that the cargo was to be shipped from an airport in Seoul, Korea to an airport in San Francisco, California on Asiana Flight 214. Los Angeles was not listed on the air waybill as an additional stopping place. Asiana, however, shipped the goods from Seoul to Los Angeles, and trucked them from Los Angeles to San Francisco.

Asiana advances several arguments as to why it still is entitled to the Warsaw Convention's limitation on liability. First, Asiana asserts that its failure to list Los Angeles is not a violation of Article 8(c) because by "agreed stopping places," the Warsaw Convention was only referring to stops in countries other than the ones listed. (See generally, Asiana Br.) According to Asiana, listing Los Angeles as a stopping point on the air

waybill was unnecessary since Los Angeles is within the same country as San Francisco.

In support of their argument, Asiana points to the drafting history of the Warsaw Convention, as well as its overall structure and purposes. The Court need not dwell on these arguments, however, because the Second Circuit has given clear guidance on this matter. The Second Circuit recently explained that:

Both precedent and reason counsel that courts refrain from altering even slightly the plain, unambiguous language of a treaty negotiated among diverse sovereign nations. On the other hand, when language is unclear, courts are enjoined to construe treaties more liberally than private agreements and may employ traditional methods of interpretation. ... However, there can be no doubt that we may rely on these methods only when there is ambiguity in the text of the treaty.

*Maritime Ins. Co. v. Emery Air Freight Corp., 983 F.2d 437, 440 (2d Cir. 1993).* The Second Circuit found Article 8(c) to be unambiguous:

Article 9 states simply and categorically that if the waybill does not contain the particulars listed in Article 8(a)-(i) and (q), the carrier will not be entitled to limit its liability. Subsections (a), (c), and (e) are also clear, unambiguous statements. No confusion can possibly arise as to the meaning of ... "the agreed stopping places" ...

*Maritime Ins. Co. v. Emery Air Freight Corp., 983 F.2d at 440* (emphasis added). As in Maritime, a particular "listed in subsection[] (c) [is] missing from the waybill. Under Article 9, the carrier is not permitted to limit its liability if those particulars are absent." *Id. at 441.*

Asiana attempts to avoid Maritime's holding by arguing that Maritime, unlike the instant case, involved the omission of a stopping place in a different country than the ones listed. (Asiana Br. at 18.) However, the Second Circuit's reaffirmance of Maritime in *Tai Ping Ins. Co. v. Northwest Airlines, Inc., 94 F.3d 29 (2d Cir. 1996),* demonstrates the invalidity of Asiana's position. Tai Ping involved a shipment of goods from *Chicago, Illinois to Hong Kong. 94 F.3d at 30.* The Second Circuit held that the carrier was denied Article 22(2)'s limitation of liability due to its omission of two stopping places under Article 8(c). While one of the two stopping places omitted was within a country not otherwise listed on the air waybill (Narita, Japan), the other was within the United States (Anchorage, Alaska), a country already noted on the air waybill. Id. The Second Circuit discussed Article 8(c)'s purpose:

> The participants to the Convention included the requirement that the waybill contain the contemplated stopping places so that the waybill itself would notify the shipper of the international character of the flight and, thus, the applicability of the Warsaw Convention.

*94 F.3d at 32.* The Second Circuit, however, rejected the argument that if the place of origin and destination indicated the international character (in Tai Ping, Chicago and Hong Kong;

here, Seoul and San Francisco), then Article 8(c) need not be strictly complied with as to stopping places, explaining:

We recognize that it appears onerous to deprive Northwest [Airlines] of limited liability protection under Article 9 for its failure to include the agreed stopping places as required by Article 8(c). Concededly, the air waybill reveals a contract of carriage between Chicago and Hong Kong and therefore reveals the international character of the flight and the applicability of the Warsaw Convention. Nevertheless, if the air waybill does not incorporate the agreed stopping places effectively, the air waybill does not contain the information required by Article 8(c). It omits the information.

As we have stated before, the language of Article 9 is clear with respect to omissions. If an air carrier omits the agreed stopping places from its air waybill, Article 9 deprives the air carrier of limited liability protection.... The plain language of Article 9 does not make the loss of limited liability protection contingent on prejudice to the shipper or consignee.

Although this may seem commercially unreasonable today, 'to engraft such an interpretation onto the plain language of [Article 9] would require an impermissible judicial amendment of the Convention.' ... Thus, Article 9 deprives [the carrier] of limited liability protection for the loss of the ... cargo.

*94 F.3d at 33-34* (emphasis added). Similarly, here, Asiana's failure to list Los Angeles as an agreed stopping place on the air waybill constitutes an omission of information required by Article 8(c). Therefore, Article 9 requires the Court to deny Asiana the benefits of limited liability that otherwise would have been available under Article 22(2).

Second, Asiana argues that it merely changed the routing of the shipment and that it was within its rights to do so under terms allowing for a change in routing included in both the conditions of carriage found on the reverse side of the air waybill and in Asiana's Tariff Rules which are incorporated into the waybill. (See Asiana 3(g) Ex. A: waybill ("carrier may substitute alternate carriers or aircraft and may without notice and with due regard to the interest of the shipper substitute other means of transportation. Carrier is authorized to select the routing or to change or deviate from the routing shown on the face hereof."); Carlsen 2/28/97 Aff. Ex. A: Asiana's Tariff Rules (Tariff Rule 215 provides, in part, that Asiana "will determine the routing of any shipment not routed by the shipper," and "will deviate from any route shown on the Air Waybill/Consignment Note, and will forward when necessary to expedite delivery via any other carrier or transportation agency").) However, Asiana did not merely make a change in routing; it added a stopping place. "Routing" and "stopping places" are two separate concepts under the Warsaw Convention, addressed individually in separate subsections: "Routing" is addressed in Article 8(p), which is not among the particulars required by Article 9, while "stopping places" is addressed in Article 8(c), which is among the particulars required by Article 9. See Warsaw Convention, Article 8(p) (The air waybill shall contain... "a brief note of the route to be followed, if [this] matter [has] been agreed upon"), Article 9 (the particulars set out in "article 8(a) to (i), inclusive, and (q)"). The language pertaining to routing found in Asiana's conditions of carriage and tariff rules is therefore inapplicable.

Third, Asiana argues that the alleged oral agreement between Chul Kee and an unspecified Samsung agent to shipment through Los Angeles prevents the Court from granting Chubb's partial summary judgment motion. However, any oral agreement that may have been reached only added an additional "agreed stopping place"; it did not relieve Asiana of its obligation under Article 8(c) and Article 9 to include this new stopping place on the air waybill. Article 9 functions in a manner analogous to the statute of frauds; it requires certain information be written in the air waybill, including the "agreed stopping places" under Article 8(c). Any agreement reached between parties to a contract of carriage that conflicts with provisions of the Warsaw Convention is a nullity. See Warsaw Convention, Art. 33 (noting that parties to a contract of carriage may agree on terms which "do not conflict with the provisions of this convention"); see also, e.g., *Tai Ping Ins. v. Northwest Airlines, 94 F.3d at 33* ("Article 8(c) takes precedence over the terms of the tariff."); *Butler's Shoe Corp. v. Pan American World Airways, Inc., 514 F.2d 1283, 1284-85 (5th Cir. 1975).* Any agreement between Asiana and Samsung that an agreed stopping place need not be written on the air waybill would be in conflict with Articles 8(c) and 9, and therefore a nullity.

If Asiana's allegations that Chul Kee did not have time to change the air waybill are intended to be a claim of "necessity" under Article 8(c), this argument also fails. First, it is doubtful that his testimony supports a claim of necessity. (See Chubb Br. at 8-9.) Second, even if necessity is shown:

Article 8(c) provides merely that ["necessity"] alterations do not deprive the transportation of its international character, so as to

assure that the shipment remains governed by the Warsaw Convention. Article 8(c) does not state, however, that such ["necessity"] alterations also preserve the carrier's limited liability rights, and heeding, [the Supreme Court's] command to interpret the Convention strictly, I decline to read such a result into the text.

*Ajibola v. Sabena Belgium Airline, 1996 U.S. Dist. LEXIS 6899,* *12, 95 *Civ. 2479, 1996 WL 271859* at *3 (S.D.N.Y. May 21, 1996), aff'd mem., *108 F.3d 1369 (2d Cir. 1997).*

**CONCLUSION**

Asiana's air waybill listed Seoul as the airport of origin and San Francisco as the airport of destination; it did not list Los Angeles as a stopping point. Accordingly, the air waybill did not comply with Article 8(c) of the Warsaw Convention, and thus Article 9 of the Convention deprives Asiana of the otherwise applicable Convention limitation on liability. Accordingly, for the reasons set forth above, Chubb's partial summary judgment motion striking Asiana's limitation of liability defense should be granted, and Asiana's cross-motion for partial summary judgment should be denied. n1

n1 Prior to the filing of the cross-summary judgment motions, Asiana had moved to transfer this case to the Northern District of California pursuant to *28 U.S.C. § 1404,* and Chubb opposed the motion. The Court is uncertain of the practical effect of this Report and Recommendation on Asiana's transfer motion. Both parties are to address in writing, by June 30, 1997, whether: (a) Asiana's transfer motion is, as a practical matter, now moot, and

(b) if not, what discovery remains to be taken on this case as between Chubb and Asiana, regardless of whether the case is transferred.

**FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION**

Pursuant to *28 U.S.C. § 636*(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from receipt of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Loretta A. Preska, 500 Pearl Street, Room 1320, and to the chambers of the undersigned, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Preska. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993)*, cert. denied, *513 U.S. 822, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300* (2d Cir.), cert. denied, *506 U.S. 1038, 113 S. Ct. 825, 121 L. Ed. 2d 696 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636*(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: New York, New York

June 17, 1997
Respectfully submitted,

**Andrew J. Peck**
United States Magistrate Judge

## APPENDIX 4

**Mandate Denying Chubb & Sons, Inc.'s Petition for Rehearing**

**Dkt. No. 99-7617**

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**CHUBB & SON, INC.,**
**Plaintiff-Appellant,**

**v.**

**Asiana Airlines,**
**Defendant-Appellee.**

**August 4, 2000, Filed (Stamp Dated)**

**FOR THE COURT:**
Roseann B. Mackenchnie, Clerk and Beth J. Meador, Administrative
Attorney

A petition for panel rehearing and a petition for rehearing en banc

having been filed herein by the appellant Chubb & Son, Inc.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

Beth J. Meador,
Administrative Attorney

Supreme Court, U.S.
FILED
JAN 29 2001
OFFICE OF THE CLERK

(2)

No. 00-720

IN THE

# Supreme Court of the United States

CHUBB & SON, INC.,

*Petitioner,*

*v.*

ASIANA AIRLINES,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## BRIEF IN OPPOSITION

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28 pp

## COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit erred in holding that the United States (which is a party to the Warsaw Convention of 1929) and the Republic of Korea (which is a party to the Hague Protocol of 1955 that amends the Warsaw Convention) are not in treaty relations with respect to international transportation by air.

## PARTIES TO THE PROCEEDING

The following persons and entities were parties before the United States Court of Appeals for the Second Circuit:

1. Petitioner Chubb & Son, Inc., as subrogee of Samsung Semiconductor

2. Respondent ASIANA AIRLINES

## STATEMENT PURSUANT TO RULE 29.6

Respondent ASIANA AIRLINES ("ASIANA") is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. ASIANA does not have a parent corporation nor does any publicly held company own 10% or more of ASIANA's stock.

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## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent ASIANA AIRLINES ("ASIANA") respectfully requests that the Court deny the Petition for a Writ of Certiorari ("Petition"), seeking review of the opinion of the Court of Appeals for the Second Circuit in this case, which is officially reported at 214 F.3d 301 (2d Cir. 2000) (App. 1a-31a).[1] The following Brief in Opposition is submitted pursuant to the letter of the Clerk of the Court, dated December 29, 2000, requesting ASIANA to submit a response to the Petition.

## TREATY PROVISIONS INVOLVED

The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (*reprinted in* note following 49 U.S.C.A. § 40105) ("Warsaw Convention"). The Warsaw Convention was amended by the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929, Done at the Hague on 28 September 1955, 478 U.N.T.S. 371 (entered into force 1 August 1963) ("Hague Protocol").

## STATEMENT OF THE CASE

Petitioner Chubb & Son, Inc., the subrogated insurer of the shipper Samsung Semiconductor, brought this action against ASIANA seeking to recover damages for the non-

1. References preceded by "App." refer to the Appendix to the Petition for a Writ of Certiorari.

delivery of two cartons of computer chips shipped in 1995 by ASIANA from Seoul, Korea[2] to San Francisco. ASIANA transported the shipment by air from Seoul to Los Angeles, and then by truck from Los Angeles to San Francisco. The ASIANA air waybill listed Seoul and San Francisco as the places of departure and destination, respectively, but did not list Los Angeles. When the cargo arrived in San Francisco, two of the cartons in the shipment were discovered missing. These cartons weighed 17.65 kilograms each and had an alleged value of $583,000.

The issue presented to the courts below was whether Article 8(c) of the Warsaw Convention, which requires that the carrier's air waybill contain the "agreed stopping places" for the transportation, was applicable to this international air transportation between Korea and the United States.[3]

At the time of the shipment, the United States was a signatory to the Warsaw Convention, but not the Hague Protocol. Korea had not signed the Warsaw Convention but adhered only to the Hague Protocol, which amended the Warsaw Convention by, *inter alia*, deleting the Article 8(c)

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2. All references to Korea are to the Republic of Korea (*i.e.*, South Korea).

3. Under Article 9 of the Warsaw Convention, a carrier whose air waybill does not contain the information required by Article 8(c) cannot limit its liability in accordance with Article 22(2) of the Convention. Article 22(2) limits a carrier's liability for lost cargo to the maximum sum of $20 per kilogram or $9.07 per pound of such cargo unless the shipper specially declares a value for the carriage and pays a supplementary fee.

"agreed stopping place" requirement. The Hague Protocol also reworded Article 22(2) of the Warsaw Convention, but retained the same $20 per kilogram liability limitation. Accordingly, under the Hague Protocol, a failure to list an "agreed stopping place" does not preclude application of the limitation of liability under Article 22(2).

The district court correctly held that because Korea signed only the Hague Protocol, it could not be bound by the "agreed stopping place" requirement in Article 8(c) of the Warsaw Convention, and that requirement is not a part of the treaty agreement between the United States and Korea with respect to international aviation. App. 46a-47a. The district court, therefore, limited ASIANA's liability to $706 based upon the weight of the non-delivered goods in accordance with the liability limitation under Article 22(2) of the Warsaw Convention. App. 47a.

The Court of Appeals reversed, finding that Korea and the United States were not in treaty relations with respect to international aviation. App. 20a-31a.[4]

## REASONS FOR DENYING THE WRIT

Petitioner offers two basic reasons as support for the grant of *certiorari*: (1) the decision of the court below is contrary to Warsaw Convention's goal of uniformity and the

4. Even though the court below found that no treaty relationship exists between the United States and Korea, ASIANA's liability still is limited in this case to the maximum sum of $20 per kilogram of goods lost by ASIANA in accordance with the Conditions of Contract in ASIANA's air waybill and ASIANA's tariffs on file with the United States Department of Transportation. *See Tai Ping Ins. Co. v. Northwest Airlines, Inc.*, 94 F.3d 29, 33 (2d Cir. 1996); *Tishman & Lipp v. Delta Air Lines*, 413 F.2d 1401, 1403 (2d Cir. 1969).

district court's decision in *In Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463, 1466 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd sub nom., Chan v. Korean Air Line, Ltd.*, 490 U.S. 122 (1989); and (2) the decision of the court below has far reaching ramifications beyond the facts of this case. Petition at 9-13.

While ASIANA considers the decision of the court below to be incorrect, ASIANA cannot agree that the reasons offered by Petitioner are correct or sufficient to warrant *certiorari*. The decision of the court below, even if incorrect, is *not* in conflict with any decision of the Court or with the decision of any other Circuit Court of Appeals and will *not* have significant impact beyond this case.

**A. The Decision of the Court Below Does Not Conflict With Any Decision of the Court or Affect the Warsaw Convention Goal of Uniform Liability Rules**

Petitioner incorrectly claims that the decision of the court below "effectively overruled" the decision of the district court in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463, 1466 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd sub nom., Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). Petition at 9. While the decision of the court below is contrary to the district court's decision in *Chan*, it neither conflicts with nor addresses any issue before the Court in *Chan*. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

The district court in *Chan*, rejecting the argument espoused by the court below that Korea and the United States are not in treaty relations, held that "Korea has chosen to

adhere to the Hague Protocol and is therefore a High Contracting Party to the Warsaw Convention *through* those amendments. . . . At least with respect to the unamended portions of the Convention, the United States and Korea are parties to the same treaty." *In re Korean Airlines Disaster of Sept. 1, 1983*, 664 F. Supp. at 1469. The district court went on to address the ticket type size issue that eventually was affirmed by the Court in *Chan*, 490 U.S. at 123-35. Petitioner, however, ignores that the status of the treaty relationship between the United States and Korea was not appealed or addressed by either the Court of Appeals or the Court in *Chan*. The fact that no appeal was taken with respect to the district court's conclusion as to the treaty relationship between the United States and Korea can be attributed to two reasons.

First, all of the passenger actions involved in the *Chan* appeal involved round-trip transportation by air US–Korea–US and, therefore, were subject to the Warsaw Convention, even if Korea was found not to be a party to the Convention.[5]

More significantly, the district court's conclusion was supported by the Ministry of Foreign Affairs of the Republic of Korea, which considered the United States and Korea to be in treaty relations. The position of the Ministry of Foreign Affairs was set forth in a letter to Korean Air Lines Co., Ltd. (dated April 20, 1984):

---

5. Article 1(1) states that the Warsaw Convention applies "to all international transportation of person, baggage, or goods performed by aircraft for hire." 49 Stat. 3014. Article 1(2) states that "international transportation" includes any transportation in which "the place of departure and the place of destination . . . are situated . . . within the territory of a single High Contracting Party, if there is an agreed stopping place within the territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention." *Id.*

> 1. The United States of America is a party to the 1929 Warsaw Convention, but not to the 1955 Hague Protocol. The Republic of Korea joined the Hague Protocol and in accordance with the provision of Paragraph 2, Article 23 of the Protocol the Republic of Korea has a status of being a party to the Warsaw Convention as amended by the said Protocol; and
>
> (Note: Paragraph 2, Article 23 of the Hague Protocol:
>
> > "Adherence to this Protocol by any State which is not a party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.")
>
> 2. Therefore, it is the position of the Republic of Korea that the Republic of Korea and the United States are both parties to Warsaw Convention *except those provisions which have been changed by the Hague Protocol.*

Letter from the Ministry of Foreign Affairs, Republic of Korea, to Korean Air Lines (April 20, 1984) (emphasis added) (Opp. App. 1a-3a); *see also* Letter from Korean Air Lines to the Ministry of Foreign Affairs, Republic of Korea, Requesting Opinion as to Interpretation of the Warsaw Convention and Hague Protocol (February 1, 1984) (Opp. App. 4a-5a).[6]

---

6. References preceded by "Opp. App." refer to the Opposition Appendix hereto.

The Korean Government's intent to be a party to the Warsaw Convention, *but only* to the extent not amended by the Hague Protocol is objectively evidenced by Article XXIII(2) of the Hague Protocol which provides:

> Adherence to this Protocol by any State which is not a Party to the [Warsaw] Convention *shall have the effect of adherence to the [Warsaw] Convention as amended by this Protocol.*

478 U.N.T.S. at 387 (emphasis added).

For this reason, the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 ILM 679 (1969), no matter how interpreted, is irrelevant because Korea expressed an intent to be a party to the Warsaw Convention only as amended by the Hague Protocol. The district court in *Chan*, as well as the district court below and in *Hyosung (America), Inc. v. Japan Airlines Co., Ltd.*, 624 F. Supp. 727, 728 (S.D.N.Y. 1985), properly concluded that Korea and the United States are parties the Warsaw Convention, except to those provisions which have been changed by the Hague Protocol. While the court below erred in deviating from this position, the decision in no way conflicts with any decision of the Court.

Similarly, the decision of the court below does not affect the uniformity goal of the Warsaw Convention or Hague Protocol because it does not address any specific liability provision of the Convention. The court below addressed only the issue of whether two states are in treaty relations. In any event, the uniformity goal of the Warsaw Convention cannot justify binding a State to all the terms of a treaty which it expressly and affirmatively has declined to accept.

## B. The Decision of the Court Below Will Not Have a Significant Impact on Other Treaties and States

Petitioner's argument that the decision of the court below will have an impact beyond this case and will extend to other treaties simply is incorrect. Petition at 11-13.

***Impact on Other Treaties.*** The issues addressed by the court below as to the treaty relations are unique to the "Warsaw System" of liability, as it has developed over the last 70 years. No other treaty scheme exists which is comprised of a combination of Conventions[7], Protocols[8] and Supplementary Conventions[9].

---

7. *See* ***Warsaw Convention (1929)***; ***Montreal Convention (1999):*** Convention for the Unification of Certain Rules for Carriage by Air, signed at Montreal on 28 May 1999, DCW Doc. No. 57 (ICAO), reprinted in U.S. Treaty Doc. 106-45 (Sept. 6, 2000) ("Montreal Convention").

8. *See* ***The Hague Protocol (1955)***; ***Guatemala City Protocol (1971):*** Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, Signed at Guatemala City, on 8 March 1971 ICAO Doc. No. 8932 (not in force); ***Montreal Additional Protocol No. 3 (1975):*** Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocols Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971, ICAO Doc. No. 9147 (not yet in force); ***Montreal Protocol No. 4:*** Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on October 12, 1929, as amended by the Protocol done at the Hague on September 8, 1955, reprinted in S. Exec. Rep. No. 105-20, pp. 21-32 (1998) (entered into force in the United States on March 4, 1999).

(Cont'd)

In fact, due to this complex scheme, the International Civil Aviation Organization ("ICAO") recently adopted the Montreal Convention (1999), which is intended to update and repiace the existing "Warsaw System" of liability. While not yet in force, to date, 66 States (including the United States) have signed and 7 States have ratified the Montreal Convention. The Montreal Convention recently was transmitted to the U.S. Senate for advice and consent to ratification. *See Message for the President of the United States Transmitting The Montreal Convention*, Treaty Doc. 106-45 (Sept. 6, 2000). Petitioner, therefore, overstates the impact and significance of the decision of the court below. *See* Petition at 11-12.

***Impact on Other States.*** Petitioner's final argument that as a result of the decision of the court below the United States now has no Warsaw Convention relations with "many nations," not only is an overstatement but is factually incorrect. *See* Petition at 12-13.

Petitioner overlooks that the issue presented below arises only in one-way transportation of passengers or cargo between the United States and a State that is a party to only the Hague Protocol. This issue does not arise in roundtrip transportation because of the definition of "international transportation." *See supra* note 5. In fact, while Petitioner lists 21 States as examples of States which, like Korea, are not in treaty relations with the United States, Petitioner simply is incorrect. According to ICAO, 154 States are parties to the Warsaw Convention and/or the Hague Protocol. Of these 154

9. *See* ***Guadalajara Supplementary Convention (1961):*** Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, ICAO Doc. No. 8181 (entered into force 1 May 1964).

States, 6 States (not 21 as Petitioner asserts) are party only to the Hague Protocol and not the Warsaw Convention: El Salvador, Grenada, Korea, Lithuania, Monaco, and Swaziland. *See* Table, Opp. App. 6a-8a.

Moreover, the United States recently ratified Montreal Protocol No. 4 ("MP4")[10], which amends the Warsaw Convention as amended by the Hague Protocol. Through its ratification of MP4 the United States effectively is in treaty relations with all States that have ratified only the Hague Protocol, in the same manner as Korea is in treaty relations with the United States. Thus, the United States is now also in treaty relations with El Salvador, Grenada, Korea, Lithuania, Monaco, and Swaziland.

Accordingly, even if the decision of the court below stands, its impact will be insignificant in the context of international transportation by air.

ASIANA agrees that the decision of the court below is wrong. However, ASIANA cannot agree that the reasons offered by Petitioner are accurate or justify *certiorari*.

Finally, the third question presented by Petitioner does not warrant review by the Court. The court below did not specifically address this issue and expressly remanded the issue of subject matter jurisdiction to the district court "to determine whether there exists some other ground for subject matter jurisdiction." App. 30a-31a.

---

10. MP4 entered into force in the United States on March 4, 1999.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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# APPENDIX

# 대 한 민 국
# 외 무 부

조약741- 015839 (720-2337) 198 4 . 4 . 20 .

수신 대한항공(주) 사장

제목 조약해석문제

1. 대항 법무 제 7호(84.2.1.)와 관련된 것입니다.

2. 당부의 의견을 아래와 같이 통보합니다.

- 아 래 -

가. 미국은 바르샤바협약(1929 Warsaw Convention)의 가입국이나 헤이그의정서(1955 Hague Protocol)에는 가입하지 않았으며, 아국은 헤이그의정서에만 가입하였으나 동 의정서 제 23조 제 2항의 규정에 따라 동 의정서에 의하여 개정된 바르샤바협약에 가입한 지위에 있음.

* 헤이그의정서 제 23조 제 2항:

"Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol"

나. 따라서 1929바르샤바협약중 개정부분을 제외한 여타 부분에 대하여는 한.미 양국이 동일하게 수락하고 있으므로 동 부분에 관하여는 양국이 조약관계에 있다고 하여 [illegible]

외 무 부 장

국제조약 규정 제27조 제2항의 규정에 의거
국제기구조약국장 이 장 춘

LETTER FROM MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF KOREA, TO KOREAN AIR LINES (APRIL 20, 1984)

1a

BEST AVAILABLE COPY

**ENGLISH TRANSLATION OF LETTER FROM MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF KOREA, TO KOREAN AIR LINES (APRIL 20, 1984)**

MINISTRY OF FOREIGN AFFAIRS
REPUBLIC OF KOREA

April 20, 1984

Our Ref. No. JOYAG 741-015839

To : President
Korean Air Lines Co., Ltd.

Re: Interpretation of Treaties

Dear Sir:

In reference to your Daehang-Beobmu No. 7 dated February 1, 1984, please be informed of this Ministry's position/opinion as follows:

1. The United States of America is a party to the 1929 Warsaw Convention, not to the 1955 Hague Protocol. The Republic of Korea joined the Hague Protocol and in accordance with the provision of Paragraph 2, Article 23 of the Protocol the Republic of Korea has a status of being a party to the Convention as amended by the said Protocol; and

(Note: Paragraph 2, Article 23 of the Hague protocol:

"Adherence to this Protocol by any State which is not a party to the Conversion shall have the

effect of adherence to the Convention as amended by this Protocol.")

2. Therefore, it is the position of the Republic of Korea that the Republic of Korea and the United States are both parties to Warsaw Convention except those provisions which have been changed by the Hague Protocol.

Minister (Official Seal)
Foreign Affairs
Republic of Korea

Pursuant to Paragraph 2, Article 27 of the Government Official Documents Regulations, in sole discretion of

Name : Jang Choon Lee
Title : Director General
Bureau of International Organization & Treaties

**LETTER FROM KOREAN AIR LINES TO MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF KOREA, REQUESTING OPINION AS TO INTERPRETATION OF THE WARSAW CONVENTION AND HAGUE PROTOCOL (FEBRUARY 1, 1984)**

Korean Air Lines

February 1, 1984

Our Ref. No. Daehang-Beobmu 7

To: Ministry of Foreign Affairs
Republic of Korea

Attn: Director General
Bureau of International Organization & Treaties

Re: Request for Interpretation of Treaties

Dear Sir:

We, Korean Air Lines Co., Ltd. (KAL), are defending ourselves in the cases which have been filed in the United States against us for the damages by the breaved families of the deceased passengers abroad KAL Flight 007 shot down by the U.S.S.R. fighter on September 1, 1983.

As under such circumstances our attorneys in the U.S. have made inquires to us about the Republic of Korea (R.O.K.) Government position on the interpretation of Treaties, we hereby request your position/opinion on the following inquires:

1. R.O.K. Government adhered to the "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12, 1929" provided at Hague in 1955 (hereinafter referred to as "Hague Protocol") on July 13, 1967, ratified and promulgated on October 11, 1967.

In this connection, is it interpreted that R.O.K. Government's such adherence to the Hague Protocol has the same effect as the adherence to the "Convention for the Unification of Certain Rules Relating to International Carriage by Air, October 12, 1929" (hereinafter referred to as "Warsaw Convention"); and

2. Whether R.O.K. Government has a treaty relationship in respect of the Warsaw Convention with the United States of America which is a party to the Warsaw Convention.

We look forward to having your statement in this matter.

Choong-Hoon Cho
President
Korean Air Lines Co., Ltd.

**TABLE — CURRENT STATUS OF CONTRACTING STATES REFERENCED BY PETITIONER TO THE WARSAW CONVENTION, HAGUE PROTOCOL AND MONTREAL PROTOCOL NO. 4**

| CONTRACTING STATE | WARSAW CONVENTION (1929) | HAGUE PROTOCOL (1955) | MONTREAL PROTOCOL NO. 4 (1975) |
|---|---|---|---|
| Benin | X | X | |
| El Salvador | | X | |
| Grenada | | X | |
| India | X | X | |
| Jordan | X | X | X |
| Republic of Korea | | X | |
| Kenya | X | | X |

| | | | |
|---|---|---|---|
| **Lao People's Democratic Republic** | X | X | |
| **Lebanon** | X | X | X |
| **Lesotho** | X | X | |
| **Lithuania** | | X | |
| **Malaysia** | X | X | |
| **Monaco** | | X | |
| **Nigeria** | X | X | |
| **Pakistan** | X | X | |
| **Rwanda** | X | X | |
| **Samoa** | X | X | |
| **Sri Lanka** | X | X | |

| | | | |
|---|---|---|---|
| **Swaziland** | | X | |
| **Tonga** | X | X | |
| **Zambia** | X | X | |

Supreme Court, U.S.
FILED
JUN 1 2001

No. 00-720

# In the Supreme Court of the United States

CHUBB & SON, INC., PETITIONER

*v.*

ASIANA AIRLINES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether, in 1995, the United States and the Republic of Korea were in a treaty relationship under the Warsaw Convention (The Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. 40105 note).

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# In the Supreme Court of the United States

No. 00-720

CHUBB & SON, INC., PETITIONER

*v.*

ASIANA AIRLINES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

### STATEMENT

1. a. The Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw October 12, 1929 (Original Warsaw Convention), 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. 40105 note, has two basic purposes: to "foster uniformity in the law of international air travel," *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 230 (1996), and to "limit[] the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry," *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 546 (1991). See also *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 169-170 (1999). To those ends, the Convention prescribes an extensive set of legal principles

generally applicable "to all international transportation of persons, baggage, or goods performed by aircraft." Original Warsaw Convention, art. 1(1). See generally Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

At the core of the Convention is a series of provisions governing the nature and scope of a carrier's liability for harms occurring in the course of international air travel. The Convention divides such harms into three categories: personal injury (Art. 17), damaged or lost baggage or cargo (Art. 18), and damage due to delay (Art. 19). Article 22(2) limits an air carrier's liability to $20 per kilogram of cargo lost. Article 9 of the Convention, however, precludes an air carrier from availing itself of Article 22(2)'s liability limitation if "the air waybill does not contain all the particulars set out in article 8(*a*) to (*i*), inclusive, and (*q*)." Original Warsaw Convention, art. 9. Article 8(c) requires that the air waybill contain, among other things, "[t]he agreed stopping places" for the shipment. Original Warsaw Convention, art. 8(c).

On July 31, 1934, the United States deposited its adherence to the Original Warsaw Convention as provided in its Article 38, which permits any State to adhere to the Convention after it has come into force by notifying the Government of Poland, the depositary for the Convention. The Convention entered into force for the United States on October 29, 1934. See U.S. Dep't of State, *Treaties in Force* 344 (2000); 49 Stat. at 3013. The Republic of Korea (South Korea) was not in existence when the Original Warsaw Convention was signed and concluded, and South Korea has never adhered to the Original Convention in accordance with Article 38.

b. As the airline industry and the world economy grew, the liability limitations in the Original Convention became increasingly unpopular in the United States and other countries. In 1955, a conference convened at the Hague to resolve the question whether those limits should be changed

or eliminated. Pet. App. 11a. The result of the conference was the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955 (Hague Protocol or Protocol), 478 U.N.T.S. 371.

The Hague Protocol changed some outdated language in the Original Warsaw Convention, doubled the per-passenger liability limitation to $16,600, and removed most of the exceptions to limited liability for shippers of goods. Pet. App. 11a. As relevant here, the Protocol amended Article 8(c) of the Original Warsaw Convention to eliminate the requirement that the waybill list not just the place of departure and ultimate destination but also all the agreed stopping places. Hague Protocol, art. VI.

The final clauses of the Hague Protocol prescribe the mechanism by which the Protocol comes into force and address the relationship between the Protocol and the Original Warsaw Convention. Of relevance to this case, Article XIX provides that:

> As between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955.*

Hague Protocol, art. XIX. Another of the final clauses, Article XXIII, provides (as Article 38 does for the Original Convention) that States may adhere to the Protocol after it has come into force by depositing an instrument of adherence with the Government of Poland, which is also the depositary for the Protocol. Article XXIII(2) provides that:

> Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

Hague Protocol, art. XXIII(2).[1]

Although the United States signed the Hague Protocol on June 28, 1956, the United States did not ratify it and has not adhered to it as provided in Article XXIII. See *Treaties in Force*, *supra*, at 344 n.1; *Reed* v. *Wiser*, 555 F.2d 1079, 1083-1088 (2d Cir.), cert. denied, 434 U.S. 922 (1977). On July 13, 1967, South Korea deposited with the Government of Poland notification of its adherence to the Hague Protocol. The Hague Protocol entered into force for South Korea on October 11, 1967.[2]

2. In 1995, Samsung Electronics Co., Ltd., contracted with respondent Asiana Airlines to ship 17 parcels of computer chips from Seoul, South Korea, to San Francisco, California. The waybill for the 17 parcels provided for shipment on August 10, 1995, on Asiana Flight 214 from Seoul to

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[1] Article XXI, which governs initial ratification of the Protocol, contains a provision similar to Article XXIII(2) that applies to the States that signed and ratified the Protocol to bring it into force. That provision states that:

> Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

Hague Protocol, art. XXI(2).

[2] There have been further protocols to amend the Warsaw Convention as amended at the Hague, only one of which has entered into force for the United States. On March 4, 1999, Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Montreal on 25 September 1975 (Montreal Protocol No. 4), entered into force for the United States. Because this dispute arose in 1995, however, Montreal Protocol No. 4 is not at issue in this case. See Pet. App. 13a; Restatement (Third) of the Foreign Relations Law of the United States § 322(1), at 191 (1987); *El Al*, 525 U.S. at 160 (noting that the question before the Court in that case had been settled "prospectively" by Montreal Protocol No. 4, which was ratified after the dispute in the case arose); see also note 15, *infra*.

San Francisco, with no other scheduled stops. However, Asiana instead transported the parcels on Asiana Flight 202 from Seoul to Los Angeles, California, and thereafter trucked the parcels to San Francisco. Upon delivery in San Francisco, two parcels, which contained $583,000 worth of chips and together weighed 35.3 kilograms, were missing. Pet. App. 4a.

Samsung Semiconductor, the intended recipient of the computer chips, filed an insurance claim with petitioner Chubb & Son, Inc. Petitioner paid Samsung Semiconductor $583,000 plus an additional amount based on the terms of Samsung's cargo insurance policy. Pet. App. 4a.

3. Petitioner, as subrogee of Samsung Semiconductor, then brought suit against respondent in the United States District Court for the Southern District of New York, to recover the value of the lost computer chips plus the additional amount paid under the terms of the insurance policy. The parties filed cross-motions for summary judgment on the issue whether respondent could invoke the air carrier liability limitation in Article 22(2) of the Warsaw Convention to limit its liability to a maximum of $20 per kilogram of cargo lost or damaged. Pet. App. 5a. The motions were referred to a magistrate judge, who recommended that petitioner's motion be granted because respondent had failed to comply with the waybill requirements in Article 8(c). *Id.* at 48a-61a.

4. Before the district court ruled on the magistrate's report, respondent filed a supplemental motion for summary judgment, questioning the court's subject matter jurisdiction under 28 U.S.C. 1331. Pet. App. 6a. On September 22, 1998, the district court granted partial summary judgment for respondent. *Id.* at 32a-47a. The district court recognized that "the United States has ratified the [Original Warsaw] Convention but not the [Hague] Protocol, while [South] Korea has ratified the [Hague] Protocol but not the [Original Warsaw] Convention." *Id.* at 38a. Relying on *In re Korean*

*Air Lines Disaster of September 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985), aff'd, 829 F.2d 1171 (D.C. Cir. 1987), aff'd *sub nom. Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), and *Hyosung (America), Inc.* v. *Japan Air Lines Co.*, 624 F. Supp. 727 (S.D.N.Y. 1985), however, the court held that the United States and South Korea were both parties to a treaty composed of those articles common to the Original Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol. Pet. App. 38a-43a. Because the waybill requirement of Article 8(c) of the Original Warsaw Convention was amended by the Hague Protocol, the court concluded that Article 8(c) did not constitute part of that hybrid treaty agreement between the United States and South Korea. *Id.* at 44a. Because, however, the Hague Protocol retained without amendment the liability limitation in Article 22(2) of the Original Convention, the court concluded that limitation was part of the agreement. *Id.* at 46a-47a. The court accordingly held that respondent's liability is limited to $706. *Id.* at 47a.

5. The court of appeals reversed and remanded the case for further proceedings. Pet. App. 1a-31a. The court noted that, "in 1995 when this dispute arose, the United States had ratified the Original Warsaw Convention but not the Hague Protocol, while South Korea had adhered to the Hague Protocol but not the Original Warsaw Convention." *Id.* at 12a. Relying on Article XXIII(2) of the Protocol, the court concluded that "[t]hose States that adhered to the Hague Protocol specifically adhered to the Warsaw Convention as amended at the Hague, not the Original Warsaw Convention." *Id.* at 19a. Although South Korea could have adhered separately to the Original Warsaw Convention, the court reasoned, South Korea "never exercised that option," and thus was not in a treaty relationship with the United States pursuant to the Original Warsaw Convention. *Id.* at 19a-20a.

The court of appeals also rejected the district court's conclusion that the United States and South Korea were in treaty relations with respect to the unamended portions of the Original Convention. Pet. App. 22a. The court reasoned that, "[e]ven if it could be said that South Korea agreed to be bound by a subset of the Original Warsaw Convention when it adhered to the Hague Protocol, the United States did not agree to be bound by that same subset of provisions when it ratified the Original Warsaw Convention." *Id.* at 23a-24a. The court also explained that holding the United States bound by the unamended portion of the Warsaw Convention would violate the doctrine of separation of powers by impermissibly encroaching on the treaty-making powers of the political Branches. *Id.* at 25a-26a. Holding the United States thus bound would place it in a treaty providing limited liability despite the carrier's failure to include the particulars on the waybill—"a fundamental alteration of the Original Warsaw Convention resulting in an entirely different outcome." *Id.* at 28a. The court concluded that "no precedent in international law allows the creation of a separate treaty based on separate adherence by two States to two different versions of a treaty, and it is not for the judiciary to alter, amend, or create an agreement between the United States and other States." *Id.* at 30a. Because the court held that there was no treaty relationship between the United States and South Korea on the subject, it concluded that the case does not arise under a treaty of the United States for purposes of federal question jurisdiction under 28 U.S.C. 1331. The court of appeals remanded to the district court "for further proceedings to determine whether there exists some other ground for subject matter jurisdiction." Pet. App. 31a.

## DISCUSSION

The court of appeals correctly resolved the question presented by the petition for a writ of certiorari. At the time

that the dispute in this case arose, there was no treaty relationship between the United States and South Korea under the Original Warsaw Convention, the Hague Protocol, or a treaty consisting of those provisions of the Original Convention that were not amended by the Protocol. There is no conflict among the courts of appeals on that question. Moreover, the ruling of the court of appeals should have limited effects and is interlocutory. Further, the decision of the court of appeals actually favors petitioner on the merits because the consequence of the court's ruling is that petitioner's claim against respondent is not subject to the liability limitation in the Warsaw Convention. Accordingly, this Court should deny the petition.[3]

1. The court of appeals correctly concluded that, at the time the dispute in this case arose, the United States and South Korea were not in a treaty relationship with each other under any of the treaties in the Warsaw Convention system. At that time, the United States and South Korea were party to two separate international agreements. The

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[3] The court of appeals viewed its conclusion that there was no treaty relationship between the United States and South Korea as depriving the district court of subject matter jurisdiction under 28 U.S.C. 1331. Although the conclusion that there was no treaty relationship means that petitioner has no cause of action under Article 18 of the Warsaw Convention, it is not clear that the absence of a treaty relationship means that the federal courts lack subject matter jurisdiction over the claim. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (noting that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case"). The question whether the court of appeals erred in viewing the lack of a treaty relationship as a jurisdictional question is not, however, of sufficient importance to warrant this Court's review. Moreover, the court of appeals remanded to the district court for a determination whether there is diversity jurisdiction, Pet. App. 31a, and a finding of diversity jurisdiction would render the jurisdictional aspect of the court of appeals' holding irrelevant to the outcome of the case. See also Pet. 8 (asserting that diversity jurisdiction exists).

United States was a party to the Original Warsaw Convention.[4] The United States was not, however, a party to the Hague Protocol.[5] South Korea, on the other hand, was a party to the Hague Protocol.[6] South Korea was not, however, a party to the Original Warsaw Convention.[7]

a. The court of appeals correctly rejected petitioner's contention (Pet. App. 18a) that, by adhering to the Hague Protocol, South Korea necessarily also became a party to the Original Warsaw Convention. Interpretation of a treaty begins with its text. See *El Al*, 525 U.S. at 167. Article XIX of the Hague Protocol provides that, "[a]s between Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955.*" Hague Protocol, art. XIX. That provision

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[4] In accordance with Article 38 of the Convention, which provides that any State may adhere to the Convention after it has come into force by notifying the Government of Poland, the United States deposited its adherence on July 31, 1934. The Convention entered into force for the United States on October 29, 1934. See *Treaties in Force*, *supra*, at 344; 49 Stat. at 3013.

[5] The United States signed the Hague Protocol on June 28, 1956, but never ratified it. The Senate had not given its advice and consent by 1967, at which time the Administration withdrew the Protocol from Senate consideration. See S. Exec. Rep. No. 20, 105th Cong., 2d Sess. 48 (1998). The Administration considered the increase in liability limits for claims involving death or bodily injury insufficient without legislation providing for supplemental accident insurance for passengers, and Congress failed to adopt that legislation. *Ibid.*

[6] On July 13, 1967, South Korea adhered to the Hague Protocol in accordance with its Article XXIII, which provides that any State may adhere to the Protocol after it has come into force by depositing an instrument of adherence with the Government of Poland. The Protocol entered into force for South Korea on October 11, 1967.

[7] South Korea was not in existence at the time that the Original Warsaw Convention was signed and concluded, and South Korea has never adhered to the Original Warsaw Convention as provided in its Article 38.

incorporates into the Protocol those provisions of the Warsaw Convention that were not amended by the Protocol in order to create a single, separate agreement that stands on its own. See Richard Gardiner, *Revising the Law of Carriage by Air: Mechanisms in Treaties and Contract*, 47 Int'l & Comp. L.Q. 278, 280 (1998) (explaining that "the Protocols do not simply introduce amendments to the original treaty. In effect * * * they each produce a new composite version"). Article XXIII(2) of the Protocol provides that "[a]dherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol." Hague Protocol, art. XXIII(2).[8] That provision clearly provides that, by adhering to the Protocol, a State becomes a party to the new stand-alone agreement, the Warsaw Convention as amended at The Hague, 1955.[9]

The text of Article XXIII(2) does not in terms exclude the possibility that a State, by becoming a party to the new

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[8] Article XXI contains a parallel provision that applies to the States that signed and ratified the Protocol to bring it into force. That provision states that:

> Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

Hague Protocol, art. XXI(2).

[9] "[M]ultilateral treaties such as the Warsaw Convention, * * * frequently are modified—but not thereby terminated—by 'amend[ing] agreements binding only those parties that were willing to accept the amendment while leaving the original or earlier amended agreement still in force to govern relations between the other parties, as well as between the other parties and the amending group. As a result, it has become fairly common for several versions of a multilateral treaty to exist simultaneously, with different sets of provisions operating between various groups of States.'" *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433-434 (2d Cir. 2001) (quoting Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 Va. J. Int'l L. 281, 361-362 (1988)).

stand-alone agreement, also becomes a party to the Original Warsaw Convention with respect to States that are parties only to the Original Convention. The most natural reading of that Article, however, is that a State that is not independently a party to the Original Convention and adheres to the Protocol (such as South Korea) "become[s] party only to the Convention as amended, *not* to the unamended version as well." Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 283. See also Richard Gardiner, *Carriage by Air in the U.S. Court of Appeals*, 1988 Lloyd's Mar. & Com. L.Q. 151; Bin Cheng, *What is Wrong with the 1975 Montreal Additional Protocol No.3?*, 14 Air Law 220, 223 & n.4 (1989). That is the most natural reading, in our view, because it gives force to the words "as amended by this Protocol." Hague Protocol, art. XXIII(2); see Gardiner, *supra*, 47 Int'l and Comp. L.Q. at 286. The express reference to the Convention "as amended by this Protocol" and the absence of any reference to the unamended Convention together support reading Article XXIII(2) to mean that a State that adheres to the Protocol does not on that basis alone become a party to the unamended Convention. Cf. *United States* v. *Erika, Inc.*, 456 U S. 201, 208 (1982). Under that reading, South Korea does not have a treaty relationship with the United States under the Original Convention.

We are not prepared to say that the reading that we advance is the only possible one. Some commentators have given Article XXIII(2) a different reading, under which adherence to the Hague Protocol puts a State that has not adhered independently to the Original Warsaw Convention on the same footing as a State that has adhered to both the Original Convention and the Protocol. If Article XXIII(2) had that meaning, then a State that has adhered to the Protocol (such as South Korea) would have a treaty relationship under the Original Convention with a State (such as the United States) that has adhered only to the Original Convention. See, *e.g.*, Elmar Giemulla et al., *Warsaw Con-*

*vention* 24 (1992); Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 12 (1988); Rene H. Mankiewicz, *The Liability Regime of the International Air Carrier* 3 (1981).

This Court's precedent, however, establishes that courts must give effect to the most natural reading of a treaty unless secondary indicia (such as the drafting history) clearly establish that an alternative reading is a correct one. See *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 n.5 (1989) ("Even if the text were less clear, its most natural meaning could properly be contradicted only by clear drafting history."). That approach to treaty interpretation is mandated by the separation of powers: "to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on [the courts'] part an usurpation of power, and not an exercise of judicial functions." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.).[10]

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[10] In the court of appeals, petitioner argued (Pet. App. 18a-19a) that South Korea should be deemed a party to the Original Warsaw Convention by virtue of Article 40(5)(b) of the Vienna Convention on the Law of Treaties, May 23, 1969 (Vienna Convention), 1155 U.N.T.S. 331. That provision states that "[a]ny State which becomes a party to [a] treaty after the entry into force of [an] amending agreement shall, failing an expression of a different intention by that State, * * * be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement." Vienna Convention, art. 40(5)(b). Petitioner's argument is incorrect for several reasons. First, the Vienna Convention (to which South Korea is a party but the United States is not) does not govern interpretation of the Hague Protocol. The Vienna Convention did not enter into force until 1980, and it provides that the rules it contains, unless they would apply under international law independently of the Convention, apply only to treaties concluded after the Convention's entry into force. Vienna Convention, art. 4. The rule in Article 40(5)(b) would not apply independently because it was a newly-formulated rule and thus was not existing law at the time that the Hague Protocol was adopted. See Report of the International Law Commission on its Eight-

We have found nothing in the drafting history of the Hague Protocol that suggests that Article XXIII(2) was intended to mean that a State that adheres only to the Protocol necessarily also becomes a party to the Original Warsaw Convention. Nor does the "postratification understanding of the contracting parties" (*El Al*, 525 U.S. at 167) support such a reading of Article XXIII(2). Rather, it suggests that the contrary, more natural reading is the correct one.

It has been the understanding of the Executive Branch of the United States that a State's adherence to the Hague Protocol does not make the adhering State a party to the Original Warsaw Convention. See *Hyosung*, 624 F. Supp. at 729 (noting State Department's view that South "Korea has not adhered to the Convention in its unamended form"); Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 512 n.2 (1974) (stating that the "United States is *not* in treaty relations under the Convention with any [States that have adhered only to the Hague Protocol (such as South] Korea), since they are parties to the Convention *only as amended*").[11] The State Department's annual

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eenth Session 4 May-19 July 1966, part IV, commentary (13). Second, Article 40(5)(b) applies only when the treaty itself does not address the status of States that join after amendment. See *ibid.*; Vienna Convention, art. 40(5)(b) ("failing an expression of a different intention"). And, as we have explained, Article XXIII(2) of the Hague Protocol, read most naturally, provides that such States will be bound only by the Convention as amended by the Protocol.

[11] A 1991 letter signed by the Department of State's Assistant Legal Adviser for Treaty Affairs noted that "Singapore is a party to the Warsaw Convention by reason of its adherence on November 6, 1967 to the Hague Protocol of 1955, which amends the Convention." Letter from Robert E. Dalton to David M. Salentine (Oct. 10, 1991). The letter went on to state that "Article XXI of the Hague Protocol states that ratification of the Protocol by any state which is not a party to the Convention shall have the effect of adherence to the Convention, *as amended by the Protocol*." *Ibid.* (emphasis added). (In fact, according to status lists prepared by the

publication *Treaties in Force* has consistently indicated that South Korea is not a party to the Original Warsaw Convention.[12] Although *Treaties in Force* is not intended to be a statement of the Executive Branch's official position on treaty interpretation, see *Treaties in Force*, *supra*, at i, the Executive Branch agrees that the United States is not in treaty relations under the Original Warsaw Convention with States that have adhered only to the Hague Protocol. That view is entitled to "great weight" and "respect." *El Al*, 525 U.S. at 168; *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982).[13]

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International Civil Aviation Organization (ICAO) based on information provided by the Government of Poland, Singapore was a party to the Original Warsaw Convention in 1991 because it had independently adhered to that Convention on April 9, 1971.) To the extent the view in the 1991 letter is inconsistent with the view described in the text above, the State Department no longer adheres to the view in the letter.

[12] Before 1986, *Treaties in Force* did not list South Korea in any fashion among the countries that are party to the Warsaw Convention. See, *e.g.*, U.S. Dep't of State, *Treaties in Force* 207-208 (1982). Beginning in 1986, in acknowledgment of the decisions in *Hyosung* and *In re Korean Air Lines Disaster of September 1, 1983*, the annual *Treaties in Force* reports have listed South Korea in a footnote to the list of parties to the Warsaw Convention. That footnote, however, makes clear the State Department's view that South Korea and other countries that have adhered only to the Hague Protocol "are parties to the [Warsaw] convention *as amended*; the United States is *not* a party to the amending protocol." *Treaties in Force*, *supra*, at 344 n.1.

[13] That view is apparently shared by the Government of Poland, the official depositary for both the Original Warsaw Convention and the Hague Protocol, as well as by the Legal Bureau of ICAO. See Letter from Dr. Ludwig Weber, Director, Legal Bureau, ICAO, to David Shapiro, Alternate Representative of the United States on the Council of ICAO (May 17, 2001). Although the views of the Legal Bureau of ICAO are not dispositive, the International Conference on Air Law at which the Hague Protocol was adopted was convened under the auspices of the ICAO, the international organization charged with oversight of the development of international civil aviation. See generally Convention on International

South Korea also does not consider itself to be a party to the Original Warsaw Convention. To our knowledge, South Korea expressed no understanding when it adhered to the Hague Protocol or at any time thereafter that its adherence to the Protocol made it a party to the Original Convention in its unamended form. To the contrary, in 1984, South Korea issued a letter indicating that this was not its understanding of its status. Br. in Opp. App. 2a-3a.[14]

b. In 1986, the South Korean Supreme Court held that the United States and South Korea were in a treaty relationship under the Hague Protocol (rather than the Original Warsaw Convention). See *Hyundai Marine & Fire Ins.* v. *Korean Air Lines* (Korea S. Ct. July 22, 1986) (described in Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 287; Tae Hee Lee, *The Current Status of the Warsaw Convention and Subsequent Protocols in Leading Asian Countries*, 11 Air Law 242, 243 (1986)). The Korean Supreme Court relied on the theory that a "State which is a party only to the [Original] Warsaw Convention can be regarded also as a party to the Hague Protocol considering the statement in Article 19 of the Protocol that the Convention and the Protocol should be read and interpreted together as one single instrument." Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 287; Tae Hee Lee, *supra*, 11 Air Law at 243.

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Civil Aviation, 7 Dec. 1944. The same view was endorsed by Lord Jauncey of Tullichettle in *Holmes* v. *Bangladesh Bimani Corp.*, 87 I.L.R. 365, 387 (Eng. H.L. 1989) ("carriage from the territory of a state which is a party only to one Convention to the territory of a state which is a party only to the other is not covered by the rules of either Convention").

[14] The letter takes the position, adopted by the district courts in *Hyosung* and *In re Korean Air Lines Disaster of September 1, 1983*, that South Korea and the United States are in treaty relations under a truncated version of the Original Warsaw Convention that includes only those provisions of the Original Convention that were not amended by the Hague Protocol. Br. in Opp. App. 3a. As we explain at pp. 16-17, *infra*, that view is untenable.

That theory is plainly incorrect. It is not supported by the text of Article XIX of the Hague Protocol, which, by its terms, applies only "[a]s between the Parties to this Protocol." Hague Protocol, art. XIX. Article XIX thus does not bind a State that has not adhered to the Protocol to the terms of the Protocol. Indeed, Article XIX could not be read to make a State that has not ratified or otherwise adhered to the Protocol a party to the Protocol because that would "infringe[] the principle that States are bound only by treaties to which they have consented." Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 287.

c. The court of appeals also properly rejected respondent's contention (Br. in Opp. 7), which was accepted by the district court, that the United States and South Korea were both parties to a "Truncated Warsaw Convention"—a supposed agreement comprised of those provisions of the Original Warsaw Convention that were not amended by the Hague Protocol. See Pet. App. 20a-30a. Although two other district courts have also reached that conclusion, *Hyosung*, 624 F. Supp. at 727; *In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. at 1469, it is incorrect.

As the court of appeals explained, "[e]ven if it could be said that South Korea agreed to be bound by a subset of the Original Warsaw Convention when it adhered to the Hague Protocol, the United States did not agree to be bound by that same subset of provisions when it ratified the Original Warsaw Convention." Pet. App. 23a-24a. "The Original Warsaw Convention does not provide for partial adherence and the United States has not consented to partial adherence by any State, including South Korea." *Id.* at 24a. The Original Convention was a "compromise between the interests of air carriers and their customers worldwide." *El Al*, 525 U.S. at 170. Holding the United States bound to a judicially-created treaty that contains some features of that compromise (such as the limited liability in Article 22(2)) without other features (such as the detailed disclosure re-

quirements in Article 8) would improperly rewrite the compromise to which the United States agreed. That course cannot be squared with the Constitution's requirements for treaty-making. See Pet. App. 30a ("[I]t is not for the judiciary to alter, amend, or create an agreement between the United States and other States.").

2. The question whether a country that has adhered only to the Original Warsaw Convention (such as the United States as of 1995) has a treaty relationship with a country that has adhered only to the Hague Protocol (such as South Korea) does not warrant this Court's review. There is no conflict among the courts of appeals on that question. Moreover, the issue is not likely to recur frequently. According to status lists prepared on May 17, 2001, by the International Civil Aviation Organization (ICAO) from information provided by the Government of Poland, only six States have adhered only to the Hague Protocol—El Salvador, Grenada, Lithuania, Monaco, South Korea, and Swaziland. Moreover, the United States is no longer a party only to the Original Warsaw Convention. After the dispute in this case arose, the United States also ratified Montreal Protocol No. 4, which incorporates and amends the provisions of the Warsaw Convention as amended by the Hague Protocol. See note 2, *supra*; Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 Oct. 1929 as Amended by the Protocol Done at The Hague on 28 Sept. 1955, Signed at Montreal on 25 Sept. 1975, art. XV.

A substantial number of air travel liability disputes will now be governed by Montreal Protocol No. 4, to which 51 States have adhered, as of May 17, 2001, according to ICAO's status list. The terms of Montreal Protocol No. 4 apply when "the places of departure and destination * * * are situated either in the territories of two Parties to th[at] Protocol or within the territory of a single Party to th[at] Protocol with an agreed stopping place in the territory of another State."

Montreal Protocol No. 4, art. XIV. "[T]he places of departure and destination" for round trips—a very common form of international air travel for passengers—are considered to be the same place. Thus, if a passenger buys a round-trip ticket to any country from the United States or one of the 50 other States that have adhered to Montreal Protocol No. 4, that protocol will govern liability arising from that trip whether or not the other country has adhered to that protocol.[15]

The Original Warsaw Convention and the Hague Protocol each contains provisions parallel to Article XIV of Montreal Protocol No. 4. See Original Warsaw Convention, art. 1(2); Hague Protocol, art. I. Thus, even for disputes arising before Montreal Protocol No. 4 came into force, the question of the existence of bilateral treaty relations affects the applicability of the Original Warsaw Convention and the Hague Protocol only in the case of one-way travel. See, *e.g.*,

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[15] Article XIX(2) of Montreal Protocol No. 4 contains similar language to Article XXIII(2) of the Hague Protocol. The meaning of Article XXIII(2) therefore may have some bearing on whether Article XIX(2) means that the United States, by ratifying Montreal Protocol No. 4, became a party to the Hague Protocol even though the United States has never independently adhered to the Hague Protocol. The meaning accorded Article XXIII(2) does not resolve that question, however, because the text of Article XIX(2) of Montreal Protocol No. 4 (like that of Article XXIII(2) of the Hague Protocol) does not in terms exclude the possibility that a State that adheres to the protocol thereby becomes a party to earlier agreements amended by the protocol. Interpretation of Article XIX(2) must therefore take into account the negotiating and drafting history of *that* provision, and other appropriate indicia of *its* meaning, such as the understanding of the contracting parties. The question whether Article XIX(2) makes the United States a party to the Hague Protocol was not considered by the Second Circuit in this case. See Pet. App. 13a (explaining that Montreal Protocol No. 4 has no bearing on this case because the instant dispute arose before that Protocol came into force for the United States). This case is therefore not an appropriate vehicle to address that question, which the court of appeals subsequently discussed in *Fujitsu*. See 247 F.3d at 431.

*Alexander* v. *Pan American World Airways, Inc.*, 757 F.2d 362, 363 (D.C. Cir. 1985); see also Br. in Opp. 9.

Moreover, a new stand-alone agreement that would replace the *entire* Warsaw liability regime was concluded in 1999 and is currently before the United States Senate for its advice and consent. See Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999 (1999 Montreal Convention), S. Treaty Doc. No. 45, 106th Cong., 2d Sess. (2000). The 1999 Montreal Convention, would, if it becomes applicable, prevail over the rules established under the Original Warsaw Convention and all amending protocols, and become the unified liability regime for all international civil air transportation.

Finally, even if the question presented by the petition might warrant review by this Court at some point, this case is not an appropriate vehicle to address it. The case is interlocutory: the court of appeals remanded for the district court to consider whether there is diversity jurisdiction. See p. 7 & note 3, *supra*. Moreover, acceptance of petitioner's theory that the United States and South Korea were in a treaty relationship under the Original Warsaw Convention would not affect the ultimate issue of respondent's liability. Respondent would face unlimited liability whether (as we and the court of appeals believe) no treaty applies or (as petitioner contends) the Original Warsaw Convention applies, because respondent did not comply with Article 8(c) of the Original Convention, which is a prerequisite to application of the liability limitation in Article 22(2). Original Warsaw Convention, art. 9.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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